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No. 00-_____

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN, Petitioner,

v.

RONALD DEAN COMBS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
(no date of execution scheduled)

QUESTIONS PRESENTED

I.

Shortly after shooting two women, Ronald Combs was asked, "What happened?" He responded, "Talk to my lawyer."

The question presented is whether the Fifth Amendment prohibits evidence of this response, when (a) it occurred before *Miranda* warnings and (b) the prosecution offers it to rebut a defense of mental incapacity.

II.

Whether, under *Strickland v. Washington*, 466 U.S. 668 (1984), there is "prejudice" when, in addition to the prosecution's evidence of the defendant's guilt, the cross-examination of a defense witness yields testimony confirming the defendant's guilt.

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The Attorney General of Ohio, on behalf of Margaret A. Bagley, warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-48a,[1] is reported at 205 F.3d 269 (6th Cir. 2000). The opinion of the district court, App. 51a-270a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2000, and a petition for rehearing was denied on March 28. On June 5, an extension of time for filing this petition was granted until August 25, 2000. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

3. The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

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[1] "App." refers to the separately bound Appendix to this petition.

STATEMENT OF THE CASE

There is no dispute that respondent Ronald Combs pulled the trigger of the shotgun that killed Peggy and Joan Schoonover, the mother and grandmother of his three-year-old son, Joey. The homicides occurred in Cincinnati in broad daylight at the end of the workday and were witnessed by several bystanders, including a uniformed deputy sheriff, James Neil. Immediately after these killings, when Neil ordered Combs to freeze, Combs responded with an apparent attempt to shoot Neil, at which point Neil shot and severely wounded Combs.

The two questions presented in this petition concern evidence at Combs' murder trial relating to his cognitive capacity at the time of these homicides.

1. The murder trial

Combs' defense was that he was too intoxicated to commit the homicides intentionally and with "prior calculation and design," Ohio's term for premeditation. Although there was evidence of intoxication, there also was considerable evidence of intent and premeditation. Combs had become estranged from Peggy Schoonover, and Combs blamed Peggy's mother, Joan, for coming between him and Peggy. This estrangement also prevented Combs from seeing his son Joey, a development that particularly upset him. Tr. 911.[2]

More specifically, Combs' cousin Tony Liming testified that on the afternoon of the homicides, July 15, 1987, Combs had told Tony that he needed a gun. Combs drove Tony from Cincinnati to Mt. Orab, a rural town about 30 miles away, to see if Combs could borrow a gun

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[2] "Tr." refers to the transcript of the trial, copies of which have been lodged with the Clerk of this Court.

from Tony's uncle, Tim Liming. Tim refused, but Tony's father (and Tim's brother) Richard Liming lived only a few miles away. Upon learning that Richard was not at home, Combs apparently broke into Richard's house and stole the shotgun that he later used to kill Joan and Peggy Schoonover. Tr. 966.

After driving Tony back to his house, Combs obtained some shotgun shells, loaded the weapon, and taped extra shells to his torso. He then proceeded to drive downtown to the office where Joan and Peggy were getting off work. Combs arrived as they were making their way to their own car. The two women drove away, and Combs chased after them.

Some minutes later, Peggy and Joan pulled into a parking lot in front of another office building. Combs pulled up beside their car and got out of his car. He then smashed the front passenger window of their car with the shotgun and proceeded to shoot Joan and Peggy point-blank, with a single shot to each of their heads. One witness testified that Combs paused between raising the shotgun and firing his first shot, and then paused again before firing the second shot. Tr. 995.[3]

2. The evidence at issue here

Two additional pieces of evidence are especially relevant to the questions presented in this petition. First is a statement that Combs made to the Cincinnati police

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[3] As further evidence of intent and premeditation, the prosecution offered the testimony of a nurse at the hospital where Combs was treated for the gunshot wounds he received from Deputy Sheriff Neil. The nurse testified that, after coming out of surgery, Combs asked her, "what happened to . . . the two bitches that I shot[?]" The nurse, stunned, responded that they were dead. Combs then replied: "serves the Goddamned whores right." Tr. 1089-90.

officer, Douglas Ventre, who arrived at the scene just moments after Deputy Sheriff Neil, having shot Combs, had left to take cover while reloading his revolver. The second is testimony on cross-examination by the expert witness called to support the defense of mental incapacity.

a. The "talk to my lawyer" assertion

Officer Ventre and his partner arrived at the scene a few minutes after the shootings. When Ventre got there, all he knew was what he saw: two women shot in the car, and Combs sitting on the ground, bleeding, with a shotgun in his lap, his finger on the trigger, and "blood all over the place." Tr. 1041. Ventre had no idea who had shot Combs, or where this other shooter was, since Neil had disappeared from the scene and Ventre did not see Neil until he got back to the police station.

As Ventre approached Combs, he told Combs to drop the gun, but Combs began to raise the gun as if to aim at Ventre. Combs, however, "ran out of gas" and dropped his gun back into his lap. Tr. 1043. Ventre ran forward, grabbed the gun from Combs, and took cover behind the victims' car to assess the situation. Having seen the bullet holes in the car, as well as the blood on Combs, Ventre "wasn't sure who else might be in the area shooting." Tr. 1044.

Ventre then approached Combs again and asked what happened. Combs mumbled, "the guy shot me." Tr. 1045. Ventre then asked who shot him, but Combs did not respond. Instead, Combs asked how the people in the car were. When Ventre said he did not know, Combs stopped talking. By that time, the ambulance from the fire department had arrived. As Ventre was helping the fire lieutenant to move Combs, Ventre discovered that

Combs had two shotgun shells taped to his lower abdomen.

The rescue unit then put Combs on a stretcher, and Ventre asked Combs again what happened. Combs responded, "Talk to [my] lawyer." This exchange occurred no more than ten or fifteen minutes after Ventre arrived on the scene. Tr. 1045-46. After Combs told Ventre to talk to his lawyer, Ventre did not ask another question.

When Ventre testified at the trial about the "talk to my lawyer" statement, defense counsel did not object. At the end of Ventre's testimony, the judge instructed the jury:

> [T]he defendant Ronald Dean Combs has a constitutional right not to speak to members of law enforcement without counsel and not to speak to them. You cannot draw any inferences for or against the defendant because he may have requested an attorney or made no further statements to Officer Ventre when he was on the stretcher as Officer Ventre testified to.
>
> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give to this testimony depends upon your findings and the weight that you attribute to this testimony in this regard[,] so please remember that.

Tr. 1052-53. Defense counsel did not object to this limiting instruction. Combs did not testify in his own defense.

In closing arguments at the guilt phase of the trial, the prosecution referred to this "talk to my lawyer" statement:

> *Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated he doesn't know what is going on?* Isn't that evidence that he realizes the gravity of the situation and at this

time gave that particular comment or response to Officer Ventre?

Tr. 1255 (emphasis added).

b. Dr. Fisher's cross-examination

As part of the defense of mental incapacity caused by excessive intoxication, defense counsel put on the stand a forensic psychologist, Dr. Roger Fisher. On cross-examination, this exchange occurred:

Q. Dr. Fisher, you have rendered an opinion that at the time, July 15th, the defendant was under the influence, is that correct?

A. That's my opinion, yes.

Q. You are not, however, saying that the acts he did on that particular day were not done purposely?

MR. STIDHAM: Objection.

THE COURT: Overruled.

A. I certainly am not, no.

Q. So he may have been under the influence[,] or your opinion based on what you were told he was under the influence[,] but at the same time he was acting intentionally and purposely when he acted as he did on July 15th; is that correct?

MR. STIDHAM: Objection.

THE COURT: Overruled.

A. I certainly believe that he was, yes.

Tr. 1183.[4]

On re-direct, Dr. Fisher reiterated that "it would be my conclusion psychologically that his judgment was

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[4] Although this was an opinion on the ultimate issue in the case, Ohio Rule of Evidence 704 expressly permits this kind of expert testimony.

impaired by what was happening to him and what he was ingesting." Tr. 1187. On re-cross, the prosecution asked again whether Combs "wasn't so impaired that he could not form this intent?" Dr. Fisher answered, "That is correct, yes." Tr. 1188.

During closing arguments at the guilt phase of the trial, the prosecution invoked Dr. Fisher's testimony on cross-examination as well as its own evidence of intent and premeditation. After closing arguments, the judge instructed the jury that under Ohio law intoxication is no excuse, but a defendant may attempt to show that he was so intoxicated that his mind lacked the capacity for intent or premeditation. *See* Tr. 1270. The jury convicted Combs on both counts of aggravated murder. In the penalty phase of the trial, Combs was sentenced to death.

3. Post-trial proceedings in state court

In his direct appeal, Combs did not present any claim concerning Dr. Fisher's testimony. He did challenge the admissibility of the "talk to my lawyer" statement, as well as the judge's limiting instruction, but because his counsel had failed to object at trial, appellate review of this claim was under the "plain error" standard. The court, however, found no error at all, because Combs had not received any *Miranda* warnings before he uttered these words. "Here because there was no inducement to silence and no subsequent breach of a promise not to use that silence against the appellant, we do not have the sort of conduct that was disapproved in . . . *Wainwright v. Greenfield* (1986), 474 U.S. 284." App. 304a. And because the court saw no error, it also rejected the additional claim of ineffective-assistance-of-counsel based on the failure to object at trial regarding the "talk to my lawyer" evidence.

The Ohio Supreme Court affirmed, but on harmless error grounds. Because Combs was in custody at the time he told Ventre to "talk to his lawyer," the state supreme court thought that Combs was entitled to receive *Miranda* warnings before being asked what happened.[5] And believing that Combs was entitled to *Miranda* warnings, the court viewed as unconstitutional the prosecution's reliance on Combs' invocation of the right to remain silent. The Ohio Supreme Court, however, ruled this error harmless in light of the other "compelling" evidence of intent and premeditation. App. 278a.[6]

Upon completion of direct appeal, Combs unsuccessfully pursued state post-conviction review. His claim of ineffective-assistance-of-counsel in connection with Dr. Fisher's cross-examination was held to be procedurally barred because it had not been raised on direct appeal.

4. Federal habeas proceedings

On August 30, 1995, Combs filed this federal habeas action under 28 U.S.C. § 2254. He renewed his claims regarding "the talk to my lawyer" evidence and Dr.

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[5] We do not dispute that Combs was in custody when he made this response, but the court's conclusion does not follow from this premise. Rather, Ventre's question – which he asked upon finding live ammunition taped to Combs' torso, just a few minutes after arriving at the crime scene, and at a time when he did not know the identity or whereabouts of the person who shot Combs – properly fell within the "public safety" exception to the *Miranda* warnings requirement. *See New York v. Quarles*, 467 U.S. 649 (1984).

[6] The Ohio Supreme Court also suggested that the "talk to my lawyer" statement was excludable under the State's rules of evidence, but that suggestion is irrelevant here, on federal habeas, because of the court's harmless error holding.

Fisher's cross-examination. As to the former claim, the district court agreed with the Ohio Supreme Court that it was harmless error because the evidence of guilt was "overwhelming." *See* App. 217a, 221a. As to the latter claim, the district court found it procedurally defaulted. *See* App. 174a. Rejecting Combs' other claims as well, the district court denied habeas relief.

The Sixth Circuit reversed and ordered a conditional habeas writ, subject to a new trial. Identifying a sharp conflict among the circuits on whether the Fifth Amendment permits use of pre-arrest silence as part of a prosecution's case-in-chief, the court of appeals sided with the view that finds this use to violate the Fifth Amendment. *See* App. 22a-25a.[7] The court of appeals then found the Fifth Amendment violation to be the predicate for an ineffective-assistance-of-counsel claim.

Turning to the testimony of Dr. Fisher (and ruling the state-court procedural bar inadequate), the Sixth Circuit held that trial counsel violated the Sixth Amendment by putting Dr. Fisher on the stand. Counsel should have known what Dr. Fisher would say when asked whether Combs had been too intoxicated to form intent or premeditation. In a post-conviction deposition, trial counsel acknowledged surprise at Dr. Fisher's testimony on cross-examination, and the court of appeals found it "inexcusable" that defense counsel was caught off-guard in this way. *See* App. 36a.

Having found these deficiencies in trial counsel's performance, the Sixth Circuit ruled that they necessitated a new trial. Despite the State's other evidence of intent and premeditation, the court of appeals considered

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[7] According to the Sixth Circuit, it did not matter whether Combs was in custody when he asserted "talk to my lawyer." Either way, the prosecution's use of this pre-*Miranda* "silence" should be considered, in the court's view, a Fifth Amendment violation.

it a "reasonable probability" that Combs would have been acquitted of intentional and premeditated murder if the jury had not heard either the "talk to my lawyer" statement or Dr. Fisher's testimony. App. 42a.[8] Judge Norris concurred regarding Dr. Fisher's testimony and found that error alone sufficient to issue a habeas writ. The court of appeals has stayed the issuance of its mandate pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

This petition presents two questions, both of which warrant this Court's review.

I. This Court should resolve the circuit conflict on the Fifth Amendment question here.

This case presents an important and unresolved question concerning the scope of "the right to remain silent" protected by the Fifth Amendment, as interpreted in *Miranda v. Arizona*, 384 U.S. 436 (1966), and related cases. The specific question here is one left open after this Court's decision in *Wainwright v. Greenfield*, 474 U.S. 284 (1986). There, the Court held that prosecutors may not rely on a defendant's statement expressing a desire to invoke his *Miranda*-related rights, even to rebut a defense of insanity, when the defendant's statement occurred after he had received *Miranda* warnings. Here, the question is whether prosecutors may use a similar statement to rebut a similar defense of mental incapacity when the defendant's statement was made *before* he received *Miranda* warnings.

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[8] In dicta, the Sixth Circuit went on to discuss errors of state law that the Ohio Supreme Court found harmless, but the Sixth Circuit's decision to order habeas relief was not based on this dicta.

In *Greenfield*, the defendant was arrested for sexual battery. Immediately upon handcuffing the defendant, the police officer gave him his *Miranda* warnings. The officer then asked the defendant whether he understood his rights and whether he wished to talk to the police. The defendant responded by saying, "I understand my rights. I do not want to speak to you. I want to speak to an attorney." 474 U.S. at 287 n. 2 (quoting the prosecution's closing summary of the police officer's testimony). At trial, the defendant pleaded not guilty by reason of insanity, and in an effort to rebut this defense, the prosecution called to the stand the arresting officer, who testified to what the defendant said in response to receiving the *Miranda* warnings. The defendant himself did not testify, relying instead on expert psychiatric testimony to support his plea of insanity. In its closing argument, the prosecution pointed specifically to the police officer's testimony, arguing that the defendant's express invocation of his *Miranda* rights contradicted his insanity defense.

Relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court ruled in *Greenfield* that it was unconstitutional for the prosecution to use the defendant's invocation of *Miranda* rights against him, given the implicit promise contained within the *Miranda* warnings themselves that his exercise of these rights would not be so used. The Court's opinion in *Greenfield* makes clear that it was resting its decision on this "implicit assurance" rationale. 474 U.S. at 289-95. This rationale, of course, does not apply in a situation where, as here, no *Miranda* warnings have been given. Thus, the Court in *Greenfield* had no occasion to resolve the specific question presented in this case.

Nor has the Court yet addressed the more general question whether a prosecution, as part of its case-in-chief, may rely on a defendant's silence prior to receipt of

Miranda warnings. This area of *Miranda*-related law has remained open even as the Court has decided other issues concerning a defendant's right to remain silent. For example, this Court has long held that the prosecution may not comment upon a defendant's refusal to take the stand. *Griffin v. California*, 380 U.S. 609 (1965). By contrast, if the defendant does take the stand, then the prosecution may use the defendant's pre-*Miranda* silence to impeach the defendant's credibility. *Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982) (per curiam); *accord Brecht v. Abrahamson,* 507 U.S. 619, 628, 639 (1993) (discussing permissible references to pre-*Miranda* silence). And, as both *Doyle* and *Greenfield* make plain, once a defendant has received *Miranda* warnings, silence thereafter may not be used against the defendant, whether either as part of a prosecution's case-in-chief or for impeachment purposes. Yet, as the Court itself has expressly acknowledged, none of these cases has required a decision on the question whether, or in what circumstances, pre-*Miranda* silence may be part of a prosecution's case-in-chief. *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980).[9]

A. This case presents a compelling context for review of the Fifth Amendment question.

The general question concerning the use of pre-*Miranda* silence can arise in various permutations. First, rebuttal use of pre-*Miranda* silence differs from cases in

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[9] The district court's decision in *Brecht* reveals that the defendant's trial there involved the prosecution's use of pre-*Miranda* silence both as part of its case-in-chief and for impeachment purposes. *See Brecht v. Abrahamson* 759 F. Supp. 500, 503 (W.D. Wis. 1991). As that case came before this Court, however, apparently only the impeachment use of this silence was at issue.

which the defendant has done nothing to put at issue his reliance on the right to remain silent. Second, express invocation of *Miranda*-related rights contrasts with cases of pure silence, where the defendant does not utter any words at all.

In this case, we have both rebuttal and an express invocation of *Miranda* rights, making the prosecution's reference to the defendant's pre-*Miranda* "silence" especially appropriate. Here, the State's use of Combs' "talk to my lawyer" statement is not an attempt to equate silence with a guilty conscience, as a way of avoiding the prosecution's burden of coming forward with actual evidence of guilt. Instead, Combs' statement is offered specifically to rebut his own defense that he was mentally incapacitated at the time he killed Peggy and Joan Schoonover. Once the defendant puts his own mental capacity at issue, his "talk to my lawyer" statement becomes relevant evidence, because it is specifically probative on whether he had the cognitive capacity to engage in purposeful conduct.

1. Rebuttal. There is no doubt that Combs himself, at the very outset of the trial, put his cognitive capacity at issue. In his opening statement, Combs' counsel made clear that lack of mental capacity (caused by excessive intoxication) would be the only defense to the charge of intentional and premeditated homicide. *See* Tr. 909-10. Thus, the defense opened the door to relevant evidence that Combs, in fact, had the mental capacity to act purposefully at the time of the homicides. The trial judge, moreover, understood this evidentiary distinction and so instructed the jury.

In this respect, the rebuttal use of pre-*Miranda* silence is closely analogous to its use for purposes of impeachment, which this Court has already upheld in *Fletcher* and *Brecht*. When a defendant himself testifies that he stabbed another man in self-defense, it is

probative of defendant's credibility that he did not offer this excuse when he was arrested for murder. *Fletcher*, 455 U.S. at 607. Likewise, when a defendant (through the testimony of others) claims that he was too intoxicated to know what he was doing at the time he shot two women, it is probative of the credibility of this defense that, within a few minutes after these shootings, he was capable of asserting "talk to my lawyer" in response to the question "what happened?"

This Court has already indicated that rebuttal, like impeachment, should be distinguished for Fifth Amendment purposes from those cases in which the defense has done nothing to open the door to evidence that the defendant chose to remain silent. "[W]here as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by [the] defendant or his counsel, we think there is no violation of the privilege." *United States v. Robinson*, 485 U.S. 25, 32 (1988).[10] Consequently, this Court should not let stand, without review, the Sixth Circuit's decision here, which did not consider rebuttal a distinguishing context.

2. Express utterance. The rebuttal use of Combs' "talk to my lawyer" statement is even more compelling precisely because it involves an express statement rather than pure silence. While pure silence in the presence of police may indicate nothing more than timidity or fear, the affirmative utterance of the assertion "talk to my lawyer" undeniably indicates a cognitive capacity to form certain thoughts and words. As then-

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[10] In *Robinson* (*id.*), the Court also quoted Justice Stevens' concurrence in *United States v. Hastings*, 461 U.S. 499, 515 (1983): "I do not believe the protective shield of the Fifth Amendment should be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses of the defendant's case."

Associate Justice Rehnquist observed in his concurrence in *Greenfield*, "a request for a lawyer . . . is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not incoherent or obviously confused." 474 U.S. at 297.

Thus, the facts here present a particularly strong case for showing the error of the Sixth Circuit's blanket proposition that the Fifth Amendment in all circumstances bars the use of a defendant's invocation of the right to remain silent as part of a prosecution's case-in-chief. Under the Sixth Circuit's *per se* rule, in no circumstances — except strictly for impeachment of a defendant who has taken the stand — is it ever proper for prosecutors to rely on a defendant's silence or invocation of Fifth Amendment rights. If that is the law in this area, it would be especially instructive to prosecutors around the country to learn this development, for presently the lower courts are far from united on this proposition.

B. The circuits are in conflict on this Fifth Amendment question.

As the Sixth Circuit extensively discussed, the courts of appeals are sharply divided on the question whether pre-*Miranda* silence may be used in a prosecution's case-in-chief. *See* App. 22a-25a. The conflict, however, is even broader and sharper than the Sixth Circuit described. There are six circuits which, contrary to the Sixth Circuit, would permit the rebuttal use of pre-*Miranda* silence as occurred here: the Third,[11]

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[11] *See United States v. Isaac*, 134 F.3d 199, 206-07 (3d Cir. 1998) (prosecutor's rebuttal "was a fair response to defense counsel's closing argument").

Fourth,[12] Fifth,[13] Seventh,[14] Eighth,[15] and Eleventh.[16] By contrast, four other circuits have ruled against the use of pre-*Miranda* silence as part of a prosecution's case-in-chief: the First,[17] Ninth,[18] Tenth,[19] and D.C.[20] None of

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[12] *United States v. McNatt*, 931 F.2d 251, 258 (4th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1992) (defendant "was well aware that if he claimed the cocaine had been planted in his truck by Officer Clarke, the prosecutor would be allowed to comment on his refusal to allow a search at the time most important to this issue"). *See also United States v. Williams*, 405 F.2d 14, 17 (4th Cir. 1968) (permitting use of pre-*Miranda* silence, as part of a prosecution's case-in-chief, in an early post-*Griffin* decision).

[13] *United States v. Zanabria*, 74 F.3d 590, 592-93 (5th Cir. 1996) (not unconstitutional for prosecutors, in rebutting a defense of duress, to rely on defendant's silence when customs agents found cocaine in his luggage).

[14] *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990).

[15] *See United States v. Rederth*, 872 F.2d 255, 257-58 (8th Cir. 1989).

[16] *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) ("the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given").

[17] *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989).

[18] *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000), *cert. pending on other grounds*, No. 00-5083 (petition filed June 28, 2000). Although the Sixth Circuit listed the Ninth Circuit as contrary to its own position here, based on an earlier decision in *United States v. Oplinger*, 150 F.3d 1061 (9th Cir. 1998), the Ninth Circuit's later decision in *Whitehead* indicates that prosecutors may not use, as part of their case-in-chief, silence that occurs after an individual has been placed in custody but before he has received *Miranda* warnings.

[19] *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991).

[20] *United States v. Moore*, 104 F.3d 377, *reh'g denied*, 110 F.3d 99 (D.C. Cir. 1997). Judge Silberman, however, disagreed with the majority in *Moore* and would have adopted a view that supports our position here: "it is only after a *Miranda* warning, or at the very minimum, the time that a *Miranda* warning

these latter four cases, however, involve rebuttal specifically. Indeed, to our knowledge, no other circuit has adopted the extreme position of the Sixth Circuit here, which would bar even pre-*Miranda* "silence" in the form of an express invocation of the right to counsel, when that express utterance rebuts a defense of cognitive incapacity.[21]

Most pointedly, the Seventh Circuit has adopted precisely the opposite position from the Sixth Circuit in a case with facts functionally identical to those existing here. *See Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990).[22] In *Thomas*, the only defense to the charge of murder was insanity. To rebut this defense, the prosecution put on testimony that, at the time of his arrest but before *Miranda* warnings, the defendant asked for a lawyer. In an opinion by Judge Posner, the Seventh Circuit observed that this use, for rebuttal purposes, of the pre-*Miranda* request for an attorney was permissible. As the court explained, "since the request was made before he was given his *Miranda* warnings, this testimony did not violate *Greenfield*." *Id.* at 1416.

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should have been given, that a defendant's silence could be thought protected." *Id.* at 394. (Silberman, J., concurring in result) (citation omitted).

[21] In a recent opinion, the Sixth Circuit has confirmed that its holding here turns on the fact that Combs did not take the stand. *See Seymour v. Walker*, 2000 WL 1154017, at *13 (Aug. 16, 2000). Thus, the Sixth Circuit refuses to recognize the need to permit the *rebuttal* as well as *impeachment* use of pre-*Miranda* silence.

[22] Citing *United States ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987), the Sixth Circuit listed the Seventh Circuit as agreeing with its view of the Fifth Amendment, but the Seventh Circuit's subsequent decision in *Thomas* reveals that *Lane* does not apply where, as here, an affirmative utterance (rather than pure silence) is used to rebut a defense of mental incapacity.

In *Dickerson v. United States*, 120 S.Ct. 2326, 2334-35 (2000), this Court recognized the need, from time to time, to refine the contours of the *Miranda*-related jurisprudence that has developed in the interpretation of the Fifth Amendment. It has been almost fifteen years since *Greenfield*, and in that intervening period considerable confusion has arisen among the lower courts concerning not only the scope of *Greenfield* itself, but also the scope of other related precedents, including *Griffin* and *Fletcher*. This case offers a factually compelling context in which to clarify this particular area of *Miranda*-related law.

C. There is no impediment to this Court's review of the Fifth Amendment issue.

The fact that Combs was in custody at the time he uttered "talk to my lawyer" is no obstacle to a grant of certiorari. If our view is correct, as held in six circuits, then the critical fact is that this utterance occurred prior to the issuance of *Miranda* warnings. Moreover, even though Combs was in custody, no *Miranda* warnings were required at the specific time Officer Ventre asked Combs the question which prompted the "talk to my lawyer" response. As already noted (page 8, n. 5 *supra*), given the particular factual circumstances, this question was entirely reasonable in light of Officer Ventre's legitimate concern for public safety at the time. Thus, this case properly presents the question whether the Fifth Amendment bars evidence of a defendant's silence at a time when *Miranda* warnings were neither given nor required.

Nor is it an obstacle to this Court's review of this *Miranda*-related issue that it arose on federal habeas in connection with a Sixth Amendment ineffective-assistance-of-counsel claim. The Sixth Circuit squarely

predicated its finding of ineffectiveness on its antecedent holding that the "talk to my lawyer" evidence was a Fifth Amendment violation to which defense counsel should have objected. App. 31a. Consequently, this Fifth Amendment issue is properly before this Court for review. And were this Court to reverse the court of appeals on this Fifth Amendment issue, the "talk to my lawyer" evidence (being permissible) would provide no basis for a Sixth Amendment violation, since no prejudice could have resulted from defense counsel's failure to object.[23]

In short, an important and unresolved question of Fifth Amendment law, on which the circuits are sharply divided, is properly before this Court in a factually compelling case, and this Court should exercise its certiorari jurisdiction here.

II. The issue of *Strickland* "prejudice" also deserves this Court's review.

This case also raises an important and open issue about the basic meaning of "prejudice" for purposes of the analysis required by *Strickland v. Washington*, 466 U.S. 668 (1984). Can it count as "prejudicial" under *Strickland* that a defense witness on cross-examination provides testimony that confirms the defendant's guilt? In one

---

[23] Similarly, this Court's review of the Fifth Amendment issue is unaffected by the Ohio Supreme Court's suggestion that the "talk to my lawyer" statement was excludable under the State's rules of evidence. The Ohio Supreme Court held that the admission of this statement into evidence was harmless, and therefore it cannot qualify as *Strickland* prejudice that defense counsel failed to object on state-law grounds. Accordingly, as this case comes to this Court on federal habeas under 28 U.S.C. § 2254, a ruling in our favor on the Fifth Amendment question would remove one of the two grounds the Sixth Circuit relied upon in ordering habeas relief.

sense, this testimony could be considered prejudicial if the jury likely would have acquitted the defendant had it not heard this testimony. In another sense, however, this testimony should not be considered prejudicial, because there is nothing incorrect or unfair about a conviction that results after the jury has heard from the defendant's own witness that the defendant is indeed guilty.

In this case, under either conception of *Strickland* prejudice, the Sixth Circuit's decision should be reversed. Even if the proper focus of the prejudice inquiry addresses only the likelihood that the jury would have acquitted the defendant had it not heard this additional evidence of guilt, the Sixth Circuit had no basis to issue a writ of habeas corpus here, since there is no "reasonable probability" that the jury would have acquitted Combs. Indeed, this point is true even supposing the jury had heard neither Dr. Fisher's cross-examination nor the "talk to my lawyer" statement.

We would urge this Court, however, that there is no need to conduct this probability analysis where, as here, the defendant is complaining that one of his own witnesses on cross-examination provided probative and competent evidence tending to confirm the defendant's guilt. As this Court said in *Strickland* itself, the purpose of the right to effective assistance of counsel guaranteed by the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial." 466 U.S. at 689. Simply put, there is no basis for claiming the denial of a "fair trial" on the ground that a defense witness unexpectedly provides evidence of defendant's guilt in response to entirely legitimate questions from the prosecution on cross-examination.

Accordingly, we ask that this Court grant certiorari here to consider, first, whether this "fair trial" understanding of *Strickland* prejudice is correct. If so, then this Court should reverse the Sixth Circuit's finding

of prejudice without need for further review of the other evidence of guilt in the record. If not, then we would ask that the Court proceed, secondly, to review whether there is a "reasonable probability" that the jury would have acquitted Combs had it not heard Dr. Fisher's cross-examination.[24] The Sixth Circuit's finding of "reasonable probability" is plainly insupportable on the record here. Thus, either way, this Court should grant certiorari to review the Sixth Circuit's improper holding on the issue of *Strickland* prejudice.

A. This Court's opinions support our conception of *Strickland* prejudice.

This Court's opinions on ineffective-assistance-of-counsel, from *Strickland* through *Williams v. Taylor*, 120 S. Ct. 1495 (2000), accord with our view that under the Sixth Amendment the inquiry should be whether Combs was denied *a fair trial* as a result of the prosecution's effective cross-examination of Dr. Fisher. In *Strickland* itself, this Court repeatedly emphasized that, in defining what qualifies as a cognizable claim of ineffective-assistance-of-counsel, "we must take its purpose – to ensure a fair trial – as the guide." 466 U.S. at 686.[25] Thus, the Court added: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as

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[24] If (contrary to our Fifth Amendment argument) the "talk to my lawyer" statement should have been excluded from the jury, then the "reasonable probability" analysis would put aside this evidence as well.

[25] *See also id.* at 691-92: "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."

having produced a *just* result." *Id.* (emphasis added). Similarly, in the companion case to *Strickland*, the Court reiterated: "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984).

The Court's subsequent opinions confirm that, under the *Strickland* standard of prejudice, a conviction should not be overturned because of a defense counsel's error, unless that error renders the verdict of guilt unreliable. In *Nix v. Whiteside*, 475 U.S. 157 (1986), this Court refused to permit a defense counsel's decision to keep his client from committing perjury to qualify as prejudice for *Strickland* purposes. Even if the jury might have been swayed by the perjured testimony, the actual verdict of guilt returned by the jury was not rendered unreliable by the fact that the jury did not get to hear this perjury. *See Nix*, 475 U.S. at 175. Likewise, in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Court held that a defendant is not entitled to a new trial (or, in a capital case, a new sentencing proceeding) because defense counsel failed to make an objection that would have been successful under then-prevailing circuit law but should not have been successful given a subsequent correction in the applicable legal standard. As the Court emphasized, the defense counsel's failure to object on ultimately erroneous grounds did not render the result of the original trial either "unreliable" or "unfair." *See id.* at 366, 369, 371.

Moreover, in his concurrence in *Kimmelman v. Morrison*, 477 U.S. 365, 391, 397 (1986), Justice Powell suggested that defense counsel's failure to object to the admissibility of illegally obtained evidence could not qualify as prejudicial under *Strickland*, as long as the damaging evidence was otherwise probative and reliable. In that case, the defendant had been tried and convicted

of rape, and defense counsel failed to object to the admission of a semen-stained bedsheet obtained from the defendant's dwelling without a warrant. Because this evidence was reliable and probative of guilt – and would undoubtedly be admissible but for the exclusionary rule applicable to Fourth Amendment violations – Justice Powell reasoned that the defendant was not unfairly convicted because of his counsel's failure to timely invoke the exclusionary rule. "The admission of the bedsheet thus harmed respondent only in the sense that it helped the factfinder make a well-informed determination of respondent's guilt or innocence." *Id.* at 397.[26]

Although Justice Powell's point has evident power, our position here need not go so far. The bedsheet in *Kimmelman* was obtained in violation of the Fourth Amendment (or at least the case came to this Court predicated on that assumption). Even if this evidence was reliable and probative, under the exclusionary rule the defendant was entitled to have it kept out of the trial. Defense counsel's failure to keep it out arguably deprived the defendant there of the right to confine the prosecution to evidence obtained in conformity with the Constitution's commands.

By contrast, Dr. Fisher's testimony was not unconstitutional or otherwise unlawful. There was nothing improper in the prosecution's cross-examination of Dr. Fisher concerning the exact nature of his expert opinion regarding the degree of Combs' intoxication and its effect on his cognitive capacity. For these reasons,

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[26] The Seventh Circuit has also expressly adopted this view. *See Holman v. Page*, 95 F.3d 481, 491 (7th Cir. 1996), *reh'g denied*, 102 F.3d 872 (7th Cir. 1996), *cert. denied*, 520 U.S. 1254 (1997). As this view necessarily entails a rejection of the Sixth Circuit's position regarding Dr. Fisher's cross-examination, the Sixth and Seventh Circuits are in direct conflict on the second as well as the first question presented in this petition.

even if it might be said (contrary to Justice Powell) that the defendant in *Kimmelman* suffered unfair prejudice because his lawyer failed to make a timely Fourth Amendment objection to the bedsheet evidence, it cannot be said here that Combs suffered unfair prejudice simply because the prosecution was able to conduct an effective cross-examination of a defense witness.

Last Term's decision in *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (opinion of the Court on this issue per Justice Stevens), is not to the contrary. That case concerned a defense counsel's failure to discover *exculpatory* evidence that might well have caused the jury to exonerate the defendant. (The exculpatory evidence there was presented at the sentencing phase of a capital case, but the same principle would apply to the guilt phase as well.) This case, conversely, involves counsel conduct that caused the jury to hear additional *inculpatory* evidence. In evaluating a claim of *Strickland* prejudice, these two situations are worlds apart. A primary function of a defense attorney in a criminal trial is to put before the jury evidence that exonerates the defendant. A defense lawyer who fails to give the jury such exonerating evidence truly deprives the defendant of the reliable and fair trial that the Sixth Amendment protects. "Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of *exculpatory* information not disclosed to the defense by the prosecution." *Strickland*, 466 U.S. at 694 (emphasis added).

On the other hand, putting before the jury a witness whose cross-examination tends to confirm the defendant's guilt does not keep exculpatory information from the jury. It does not prevent the jury from hearing evidence that might have been a basis for an acquittal. The conviction that results from the jury's hearing, out of the mouth of a defense witness, extra evidence of the

defendant's guilt is neither unreliable nor unfair – and thus should not be considered prejudicial in the sense of *Strickland*.

B. There is no "reasonable probability" of an acquittal.

In any event, even under the alternative conception of *Strickland* prejudice, which asks only whether there is a "reasonable probability" that the defendant would have been acquitted in the absence of counsel's error, there is no such "reasonable probability" here. As the Ohio Court of Appeals, the Ohio Supreme Court, and the federal district court all found – contrary to the Sixth Circuit – the evidence of intent and premeditation was overwhelming. This is true even taking away the "talk to my lawyer" statement, as well as Dr. Fisher's testimony on cross-examination.

As detailed in the opening statement of this petition (pages 2-3, above), the evidence of intent and premeditation included the several hours and many miles that Combs drove in search of a gun and ammunition. It also included the evidence that Combs hunted down the Schoonovers in their car, smashed in the car window, and then paused before firing a shot to each of their heads. (And it included as well the statement Combs made to the nurse upon coming out of surgery for his gunshot wounds. *See* n.3, *supra*.) In light of all this evidence, it is not "reasonably probable" that the jury would have found Combs not guilty of intentional and premeditated murder.

In concluding otherwise, the Sixth Circuit apparently believed that, because the "talk to my lawyer" statement and Dr. Fisher's testimony were especially strong evidence concerning Combs' mental capacity, it must follow that without this evidence there would have

been a "reasonable probability" of a different result.[27] But the court's conclusion does not follow from its premise. Under the "reasonable probability" standard, the task is to judge, not whether the remaining evidence is relatively weaker than what the jury never should have heard, but instead how strong is this remaining evidence on its own. And here the remaining evidence is plenty strong enough.

The Sixth Circuit also suggested that this remaining evidence was consistent with the possibility that Combs was planning to commit suicide. App. 41a. But this suggestion is demonstrably incorrect: most particularly, the suicide theory is inconsistent with the fact that Combs taped extra shotgun shells to his abdomen. It is simply untenable to maintain that there is a *reasonable probability* – as opposed to a mere "theoretical possibility" – that the jury would have accepted this suicide theory as a basis for acquitting Combs of intentional and premeditated murder. *See Evans v. Meyer*, 742 F.2d 371, 374 (7th Cir. 1984); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (citing *Evans* for proposition that there is no *Strickland* prejudice when it is "inconceivable" that an intoxication defense would have been successful).

In sum, the Sixth Circuit's decision is error under either conception of *Strickland* prejudice, and thus the *Strickland* issue here warrants this Court's review along with the Fifth Amendment question presented.

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[27] Immediately after saying that the prosecution's case would have been "much weaker" without these two disputed pieces of evidence, the Sixth Circuit said: "We *therefore conclude* that absent defense counsel's errors, there is a reasonable probability that the jury would have concluded that the State did not meet its burden proving [intent and premeditation]." App. 42a (emphasis added).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN, Petitioner,

v.

RONALD DEAN COMBS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4369

RONALD DEAN COMBS, *Petitioner-Appellant*,

v.

RALPH COYLE, *Respondent-Appellee.*

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 95-00733--Sandra S. Beckwith, District Judge.

Argued: November 2, 1999

Decided and Filed: February 23, 2000

Before: NORRIS, DAUGHTREY, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Richard A. Chesley, JONES, DAY, REAVIS & POGUE, Chicago, Illinois, for Appellant. Stuart A. Cole, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee. **ON BRIEF:** Richard A. Chesley, JONES, DAY, REAVIS & POGUE, Chicago, Illinois, Jenny L. Klitch, JONES, DAY, REAVIS & POGUE, Columbus, Ohio, Linda E. Prucha, PUBLIC DEFENDER'S OFFICE, OHIO PUBLIC DEFENDER COMMISSION, Columbus, Ohio, for Appellant. Stuart A. Cole, Jonathan R. Fulkerson, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. NORRIS, J. [p. 49a], delivered a separate opinion concurring in part and dissenting in part and joined in the judgment.

OPINION

KAREN NELSON MOORE, Circuit Judge. Petitioner-appellant Ronald Dean Combs was convicted by an Ohio jury of two counts of aggravated murder as well as a specification of an aggravating circumstance as to each count, and he was sentenced to death. Combs now appeals the district court's denial of his petition for a writ of habeas corpus. His brief sets forth twenty-nine claims, including various claims of ineffective assistance of counsel, prosecutorial misconduct, trial court error, and challenges to the constitutionality of his death sentence. For reasons that will be explained below, we conclude that Combs's trial counsel rendered ineffective assistance so egregious as to make us doubt whether Combs's trial produced a just result. Accordingly, we **REVERSE** the district court's judgment and **REMAND** to the district court for issuance of a writ of habeas corpus conditioned upon the State of Ohio granting Combs a new trial within a reasonable period of time.

I. BACKGROUND

On July 15, 1987, Ronald Dean Combs shot and killed Peggy Schoonover and her mother, Joan Schoonover. Peggy Schoonover and Combs had been involved in a relationship and had a child together, a son named Joseph. The shootings took place in the Holiday Park Tower parking lot in downtown Cincinnati, and an off-duty police officer, Deputy Sheriff James Neil,

witnessed the shootings. Neil ordered Combs to freeze, but when Combs made an aggressive move and refused to drop his shotgun, Neil fired six gunshots at Combs. Combs was taken to the hospital and underwent extensive treatment for his gunshot wounds. His right arm was amputated, and his left arm was left partly paralyzed.

Combs was charged with two counts of aggravated murder, which is defined as "purposely, and with prior calculation and design, caus[ing] the death of another." Ohio Rev. Code Ann. § 2903.01(A) (Banks-Baldwin 1997). Each count contained a specification of an aggravating circumstance, namely that the offense "was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons." Joint Appendix (hereinafter "J.A.") at 9 (Indictment); Ohio Rev. Code Ann. § 2929.04(A)(5) (Banks-Baldwin 1997). Under Ohio law, a defendant becomes eligible for the death penalty if he is convicted of or pleads guilty to aggravated murder as well as at least one of the aggravating circumstances set forth in § 2929.04. *See* Ohio Rev. Code Ann. § 2929.03(C)(2) (Banks-Baldwin 1997).

At trial, Combs did not contest that he fired the two shots that killed Peggy and Joan Schoonover. Instead, his defense was that he was too intoxicated from alcohol and drugs to form the requisite intent to kill the women or to have committed the killings with prior calculation and design. To support this theory, Combs presented the testimony of several witnesses who had seen him ingesting substantial quantities of alcohol and drugs in the days prior to and on the day of the shootings. Defense witness Dr. Roger Fisher, a clinical psychologist, also testified that, in his expert opinion, Combs was under the influence of drugs and alcohol at the time of the shootings. However, on cross examination, Fisher

explained his belief that Combs, while intoxicated, was nevertheless acting with intent and purpose.

On February 17, 1988, a jury found Combs guilty of both counts of aggravated murder as well as the specification of an aggravating circumstance as to each count. Following a sentencing hearing conducted on February 22, 1988, the jury returned a verdict imposing a sentence of death. Pursuant to Ohio Revised Code § 2929.03(D)(3), the trial court independently reviewed all the evidence and, upon concluding that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt, it adopted the jury's recommended sentence of death.

Combs then unsuccessfully pursued direct appeals and state post-conviction relief. Combs's conviction was affirmed by the state court of appeals on September 19, 1990, *see Ohio v. Combs*, No. C-880156, 1990 WL 135000, at *9 (Ohio Ct. App. Sept. 19, 1990) (unpublished opinion), and by the Ohio Supreme Court on December 18, 1991, *see Ohio v. Combs*, 581 N.E.2d 1071, 1084 (Ohio 1991), *reh'g denied*, 583 N.E.2d 974 (Ohio), *cert. denied*, 504 U.S. 977 (1992). Combs filed a petition for post-conviction relief pursuant to Ohio Revised Code § 2953.21 raising fifty-nine claims for relief, which was denied by the court of common pleas on May 20, 1993. J.A. at 420 (Ct. C.P. Denial of Pet. to Vacate). The court of appeals affirmed the denial of relief, *see Ohio v. Combs*, 652 N.E.2d 205, 218 (Ohio Ct. App. 1994), and the Ohio Supreme Court declined jurisdiction over Combs's discretionary appeal, *see Ohio v. Combs*, 644 N.E.2d 1028 (Ohio), *recons. denied*, 646 N.E.2d 469 (Ohio 1995). In June of 1993, Combs filed an application for delayed reconsideration in the court of appeals; this application was denied on February 22, 1994. J.A. at 363-64 (Entry Denying App. for Delayed Recons.). The Ohio Supreme

Court affirmed the denial without opinion. *See Ohio v. Combs*, 634 N.E.2d 1027 (Ohio), *recons. denied*, 638 N.E.2d 86 (Ohio 1994), *cert. denied*, 513 U.S. 1167 (1995).

After exhausting all state court remedies, Combs filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio pursuant to 28 U.S.C. § 2254. Combs's petition asserted fifty-three claims for relief. After finding all of these claims to be either procedurally barred or without merit, the district court denied relief on October 23, 1997. J.A. at 231 (D. Ct. Op.). The district court issued a certificate of probable cause on December 17, 1997. We have jurisdiction over Combs's timely appeal of the district court's judgment pursuant to 28 U.S.C. § 2253.

Combs's appeal sets forth twenty-nine claims for relief; these claims fall under the headings of ineffective assistance of trial counsel at both the culpability and sentencing phases, ineffective assistance of appellate counsel, prosecutorial misconduct, trial court error, and imposition of an unconstitutional sentence of death. Because our resolution of Combs's ineffective assistance of trial counsel claim renders unnecessary a decision on the others, we will confine our opinion to an analysis of the ineffectiveness claim. Additionally, we will briefly discuss trial errors that have been identified by the Ohio state courts so as to ensure that these errors are avoided on Combs's retrial.

II. ANALYSIS

A. Procedural Default

It is well established that "[i]n all cases in which a state prisoner has defaulted his federal claims in state

court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), we articulated an analysis that must be followed when a state argues that a habeas claim is defaulted because of a petitioner's failure to observe a state procedural rule. "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* at 138. "Second, the court must decide whether the state courts actually enforced the state procedural sanction." *Id.* "Third, the court must decide whether the state procedural forfeiture is an 'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim." *Id.* As we have previously stated: "For purposes of federal review in habeas cases, we may consider as an adequate and independent state procedural rule only a state procedural rule that was 'firmly established and regularly followed by the time as of which it [was] to be applied' . . . ."*Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998) (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)) (alteration in original). If we determine that the state procedural ground was adequate and independent so as to bar review, the petitioner must then demonstrate cause and prejudice or a fundamental miscarriage of justice.

Whether a state court rested its holding on procedural default so as to bar federal habeas review is a question of law that we review de novo. *See Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). In answering this question, we look

to "the last *explained* state-court judgment." *Id.* (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991)) (internal quotation marks omitted).

Combs has raised six separate claims of ineffective assistance of trial counsel at the culpability phase. Although one of these claims was presented on direct appeal and is therefore properly preserved, the other claims were first presented in Combs's state post-conviction petition. The State maintains that the state courts' dismissal of these claims under the doctrine of res judicata was proper, and that we should therefore refuse to review the merits of these procedurally defaulted claims. Combs argues that the first prong of the *Maupin* analysis is not satisfied because at the time he pursued his direct appeal, no state procedural rule mandated that his ineffectiveness claims be asserted on direct appeal.

The Ohio state courts relied on two cases to support the decision that res judicata barred consideration of the claims raised for the first time in Combs's post-conviction petition: *Ohio v. Perry*, 226 N.E.2d 104 (Ohio 1967), and *Ohio v. Cole*, 443 N.E.2d 169 (Ohio 1982). In *Perry*, the Ohio Supreme Court held that "[u]nder the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment." *Perry*, 226 N.E.2d at 106 syllabus para. 9. In *Cole*, the court recognized that there are exceptions to the absolute application of the *Perry* rule in proceedings for post-conviction relief when the criminal defendant claims ineffective assistance of trial counsel. *See Cole*, 443 N.E.2d at 171. The *Cole* court reasoned, however, that

when a defendant, "upon direct appeal, was represented by new counsel who was in no way enjoined from asserting the ineffectiveness of appellant's trial counsel and [when] such question of effective counsel could fairly be determined without examining evidence outside the record, none of the qualifications engrafted upon the *Perry* decision is apposite." *Id.* at 171. The Ohio Supreme Court later commented that "*Cole* recognizes that *res judicata* does not apply when trial and appellate counsel are the same, due to the lawyer's inherent conflict of interest." *Ohio v. Lentz*, 639 N.E.2d 784, 786 (Ohio 1994).[1]

Combs asserts that the *Cole* rule requiring defendants to raise ineffectiveness claims on direct appeal does not apply to him because he did not have new appellate counsel. At trial, Combs was represented by two attorneys, Timothy A. Hickey and Chuck R. Stidham. On direct appeal, Stidham continued his representation of Combs and was joined by new co-counsel, R. Fred Hoefle. Combs argues that the same conflict of interest that would deter an attorney from alleging his own ineffectiveness is present when that attorney is simply joined by a new attorney on appeal.

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[1] *Lentz* held that "[w]hen a criminal defendant is represented by two different attorneys from the same public defender's office at trial and on direct appeal, *res judicata* bars a claim of ineffective assistance of trial counsel raised for the first time in a petition for postconviction relief when such claim could have been made on direct appeal without resort to evidence beyond the record, unless the defendant proves that an actual conflict of interest enjoined appellate counsel from raising ineffective assistance of trial counsel on direct appeal." *Lentz*, 639 N.E.2d at 784 syllabus.

The State acknowledges that counsel cannot be expected to raise his own ineffectiveness on appeal, but argues that res judicata was properly applied to Combs's situation. First, the State asserts that Combs's new counsel actually raised a claim of ineffective assistance of counsel against co-counsel on direct appeal, thus proving that there was no conflict.[2] Second, citing *Ohio v. Zuern*, Nos. C-900481, C-910229, 1991 WL 256497 (Ohio Ct. App. 1st Dist. Dec. 4, 1991) (unpublished opinion), the State argues that the rule in *Cole* applies as a matter of law to a situation in which new co-counsel participates in the appeal. *Zuern* presented a situation nearly identical to the instant case. In *Zuern*, the defendant challenged the state trial court's dismissal of post-conviction claims of ineffective assistance of counsel pursuant to *Cole*, arguing that res judicata was inapplicable because his appellate counsel consisted of one of his two trial attorneys joined by one new appellate counsel. *See Zuern*, 1991 WL 256497, at *11. The court of appeals rejected the defendant's argument: "Unless we presume . . . that new co-counsel entering upon a criminal case at the appellate level would deliberately not exercise his professional judgment or duty to assert the ineffectiveness of his co-counsel at trial if the record demonstrated a basis for such a claim, a presumption we adamantly reject, we perceive no reason why the reference in *Cole* to 'new counsel' would not embrace new co-counsel as well as new independent counsel." *Id.* at *12; *see also Ohio v. Swiger*, 708 N.E.2d 1033, 1039 (Ohio Ct. App. 9th Dist. 1998) (holding res judicata applicable when appellant was represented on direct appeal by trial counsel and a second new attorney); *Ohio v. Landrum*, No. 98 CA 2401, 1999 WL 22626, at *12 (Ohio Ct. App. 4th Dist. Jan. 11, 1999)

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[2] This point is irrelevant to the determination of whether the rule of *Cole* was regularly applied to situations such as Combs's at the time of his appeal.

(unpublished opinion) (same); *Ohio v. Broom*, No. 72581, 1998 WL 230425, at *4 (Ohio Ct. App. 8th Dist. May 7, 1998) (unpublished opinion) (same); *Ohio v. Steffen*, No. C-930351, 1994 WL 176906, at *3 (Ohio Ct. App. 1st Dist. May 11, 1994) (unpublished opinion) (same); *Ohio v. Jamison*, No. C-910736, 1992 WL 333011, at *5 (Ohio Ct. App. 1st Dist. Nov. 10, 1992) (unpublished opinion) (following *Zuern* to hold that" the phrase 'new counsel' includes new co-counsel as well as new independent counsel," such that res judicata may be invoked to bar assertion of ineffective assistance of counsel claims). *But see Ohio v. Evans*, No. L-97-1134, 1998 WL 351884, at *4 (Ohio Ct. App. 6th Dist. June 19, 1998) (unpublished opinion) ("[W]e agree with the trial court that one additional counsel on appeal does not permit the application of res judicata to claims of ineffective assistance of counsel. It is unlikely that, as co-counsel with [trial counsel], [new counsel] would be inclined to assert a claim on appeal for ineffective assistance of trial counsel.").

However, *Zuern* was not decided until after the court of appeals had ruled on Combs's direct appeal.[3] We

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[3] Even today, it is not clear that the *Zuern* rule would qualify as a firmly established state procedural rule. The Ohio Supreme Court has never spoken on the issue, and not all the courts of appeals agree with the outcome in *Zuern*. Furthermore, the reasoning in *Zuern* seems to be in tension with that of the Supreme Court of Ohio in *Lentz*. *Lentz* can be read for the proposition that if a new attorney represents a defendant on appeal, res judicata applies unless there is an actual conflict. There may well be an actual conflict in a situation in which trial counsel is simply joined by a new attorney on direct appeal, thus suggesting that the per se rule of *Zuern* is the incorrect approach.

must instead look to established state law at the time Combs pursued his appeal. *Cole* was the authoritative case at that time, and *Cole* does not speak to a situation in which trial counsel continues on appeal with the addition of a new co-counsel.[4] Because there is ambiguity surrounding the issue and because the State cannot point to a case firmly establishing as of the time of Combs's appeal that ineffectiveness claims must be brought on direct appeal when trial counsel also serves as co-counsel on appeal, we are unable to conclude that a firmly established state procedural rule existed. Indeed, at the time Combs's appeal was filed it would have been entirely reasonable to conclude that Combs's new counsel did not meet the *Cole* standard of being "in no way enjoined from asserting the ineffectiveness of appellant's trial counsel," *Cole*, 443 N.E.2d at 171, and thus that res judicata would not apply.

Because we conclude that no firmly established procedural rule mandated the bringing of ineffectiveness claims on direct appeal in Combs's situation, we may

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[4] In a previous decision, we cited to the court of appeals's opinion in *Combs*, 652 N.E.2d at 209, as "holding that post-conviction relief is not available by virtue of the doctrine of res judicata to address constitutional claims that could have been raised on direct appeal from the conviction and sentence." *Norris v. Schotten*, 146 F.3d 314, 332 (6th Cir.), *cert. denied*, [525 U.S. 935], 119 S. Ct. 348 (1998). *Norris* did not involve the issue of whether res judicata applies to bar a claim of ineffective assistance of trial counsel when one new co-counsel joins trial counsel in the appeal. Although in *Norris* we relied on *Combs*'s explanation of the *Perry* rule, we did not express an opinion as to whether that rule was properly applied to the facts of the *Combs* case.

review the merits of all of those claims, including claims that the state court deemed barred by res judicata.

B. Ineffective Assistance of Trial Counsel at the Culpability Phase

We review a district court's denial of habeas corpus relief de novo, but we review any findings of fact made by the district court for clear error. Findings of fact made by a state court are entitled to complete deference if supported by the evidence. *See Norris v. Schotten*, 146 F.3d 314, 323-24 (6th Cir.), *cert. denied*, [525 U.S. 935], 119 S. Ct. 348 (1998).[5] The presumption of correctness accorded to state court findings "only applies to basic, primary facts, and not to mixed questions of law and fact," and it "applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility." *Groseclose v. Bell*, 130 F.3d 1161, 1164 (6th Cir. 1997) (quoting *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997)), *cert. denied*, 523 U.S. 1132 (1998).

1. The *Strickland* Standard

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The well-known two part test for

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[5] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996), is inapplicable to this case because Combs filed his petition for a writ of habeas corpus in the district court before the enactment of the statute. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

evaluating ineffectiveness claims was first articulated in *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687; *see also, e.g., Tucker v. Prelesnik*, 181 F.3d 747, 754 (6th Cir. 1999); *Chandler v. Jones*, 813 F.2d 773, 781 (6th Cir. 1987).

With regard to the performance prong of the inquiry, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of performance is highly deferential, and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Therefore, this court should judge whether, in light of all the circumstances viewed at the time of counsel's conduct, counsel's "acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are

reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91; *see also Meeks v. Bergen*, 749 F.2d 322, 328 (6th Cir. 1984). Finally, when analyzing an attorney's performance, "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (quoting *Strickland*, 466 U.S. at 690).

As for the prejudice prong of the *Strickland* test, the Court instructed: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The prejudice prong "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Therefore, the prejudice inquiry must not focus solely on mere outcome determination; attention must be given to "whether the result of the proceeding was fundamentally unfair or unreliable." *Id.* at 369.

Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact entitled to de novo review. *See Strickland*, 466 U.S. at 698; *Groseclose*, 130 F.3d at 1164 ("An ineffective assistance of counsel claim presents a mixed question of law and fact, for which both the state-court and district-court determinations are subject to *de novo* review by this court.").

2. Defense Counsel's Failure to Object to the Unconstitutional Use of Combs's "Talk to My Lawyer" Statement

Combs first claims that his trial counsel provided ineffective representation by failing to object both to the prosecution's use of a statement made by Combs to a police officer and to the trial court's sua sponte jury instruction concerning the purposes for which the jury could consider that statement.[6] As the Ohio Supreme Court found, after Combs had been shot Cincinnati police officer Douglas Ventre arrived on the scene and found Combs sitting on the ground and holding a shotgun. *See Combs*, 581 N.E.2d at 1074. Ventre then pulled the shotgun away from Combs and asked Combs what had happened, to which Combs replied "the guy shot me." *Id.* (internal quotation marks omitted). Ventre later repeated the same question as Combs was being placed into an ambulance, and Combs "told [Ventre] to talk to his lawyer." *Id.* (internal quotation marks omitted). After Officer Ventre testified about this "talk to my lawyer" statement, the trial court instructed:

> Members of the jury, I am going to give you a special instruction at this time based upon the testimony that you heard the defendant Ronald Dean Combs has a constitutional right not to speak to members of law enforcement without counsel and not to speak to them. You cannot draw any inferences for or against the defendant because he may have requested an attorney or made no further statements to Officer Ventre when he was on the stretcher as Officer Ventre testified to.

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[6] This claim was raised on direct appeal and denied. It was therefore properly preserved for our review.

> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give to this testimony depends upon your findings and the weight that you attribute to this testimony in this regard so please remember that.

R. at 1052-53; J.A. at 2673-74. Defense counsel did not object to this jury instruction, nor did they object to the prosecution's use of this statement at trial. In closing argument, the prosecution stated:

> Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated he doesn't know what is going on? Isn't that evidence that he realizes the gravity of the situation and at this time gave that particular comment or response to Officer Ventre?

R. at 1255; J.A. at 2761. Combs argues that "the trial court's instruction permitted, and the prosecution exploited, Mr. Combs' exercise of his right to consult with counsel as substantive evidence on the ultimate culpability phase issue — Mr. Combs' intent." Pet'r Br. at 18.

In order to decide whether counsel's failure to object to the use of the "talk to my lawyer" statement was deficient, we must first determine whether the use of this statement was constitutionally defective such that any reasonable counsel would have objected under the circumstances. Although Combs's statement referred not to silence but to his right to an attorney, the admissibility of the statement is properly analyzed as a comment on prearrest silence. *See Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986) ("With respect to post-*Miranda* warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire

to remain silent as well as of a desire to remain silent until an attorney has been consulted."). Combs's statement is best understood as communicating a desire to remain silent outside the presence of an attorney.

Combs grounds his argument about the admissibility of the statement in the Supreme Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, the petitioner took the stand at his trial for selling marijuana and explained, for the first time, that he had been framed. *See id.* at 612-13. For impeachment purposes, the prosecutor asked the petitioner why he had not told this story immediately after his arrest. *See id.* at 613. The petitioner was convicted, and he appealed on the ground that cross-examination regarding his post-arrest silence was error. *See id.* at 615. The Supreme Court held "that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619. The theory underlying *Doyle* is that while *Miranda* warnings contain no express assurance that silence will carry no penalty, "such assurance is implicit to any person who receives the warnings." *Id.* at 618. On this reasoning, the Court concluded that it would be fundamentally unfair first to induce a defendant to remain silent through *Miranda* warnings and then to penalize the defendant who relies on those warnings by allowing the defendant's silence to be used to impeach an exculpatory explanation offered at trial. *See id.*

Later cases have restricted *Doyle* and have reaffirmed that the "fundamental unfairness" identified by the Court derives from the implicit assurances of the *Miranda* warnings. In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Court held that due process is not violated by the impeachment use of prearrest, pre-*Miranda* warnings

silence, *see id.* at 238-39. In *Fletcher v. Weir*, 455 U.S. 603 (1982), the Court held that impeachment use of post-arrest, pre-*Miranda* warnings silence does not offend due process, *see id.* at 607. The *Weir* Court explained that *Doyle* was a case in which the government had actually induced silence with *Miranda* warnings, and it noted that any broadening of *Doyle* to a situation in which a defendant had not yet received *Miranda* warnings — even if the defendant was in custody — was unsupported by the reasoning of *Doyle*. *See id.* at 605-06.

In the instant case, Combs had not received *Miranda* warnings prior to his "talk to my lawyer" statement. The Ohio Supreme Court concluded that this was of no significance based on the following reasoning:

> [A]t the point when Combs was placed in the ambulance, we find that Combs was in custody and had a right to remain silent, consult a lawyer, and receive a *Miranda* warning. When he arrived at the scene, Officer Ventre personally took the shotgun from Combs; there were two women dead from shotgun blasts in the adjacent car; and Ventre had been at the scene for some ten to fifteen minutes. Ventre's questioning, without a *Miranda* warning, violated those rights.

Combs, 581 N.E.2d at 1075-76. However, even if Combs should have received *Miranda* warnings prior to his "talk to my lawyer" statement, the *Doyle* rationale is still inapplicable. As we have explained, the *Doyle* line of cases clearly rests on the theory that *Miranda* warnings themselves carry an implicit assurance that silence will not be penalized; actual receipt of the warnings is key. Therefore, the comment on Combs's pre-*Miranda* silence did not violate due process.

This does not, however, rule out the possibility that such comment is a violation of Combs's Fifth Amendment privilege against self-incrimination.[7] In *Jenkins*, in addition to ruling that impeachment use of a defendant's prearrest silence is not violative of due process, the Court also held that such use does not offend the Fifth Amendment's privilege against self-incrimination. *See Jenkins*, 447 U.S. at 238. The petitioner in that case took the stand at his murder trial and testified that he had killed in self-defense. *See id.* at 232. During cross-examination and again during closing arguments, the prosecutor, referring to the fact that the petitioner had waited two weeks to report the stabbing, attempted to impeach the petitioner's credibility by implying that he would have come forward earlier if he had truly killed in self-defense. *See id.* at 233-34. The Supreme Court easily disposed of the petitioner's Fifth Amendment objection to this use of his prearrest silence, relying on its 1926 decision in *Raffel v. United States*, 271 U.S. 494 (1926). *Raffel* held that the government may impeach a defendant who takes the stand in his own defense with his prior silence without violating the Fifth Amendment. *See id.* at 499. The Court in *Raffel* relied on a waiver theory, reasoning that a defendant waives his Fifth Amendment immunity from giving testimony by offering himself as a witness. *See id.* at 496-97. The *Raffel* Court concluded by explaining:

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[7] The Fifth Amendment provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify.

Id. at 499. The *Jenkins* Court therefore reasoned that the rule of *Raffel* permits impeachment use of prearrest silence.

The *Jenkins* Court went on to explain that permitting the impeachment use of a defendant's prior silence does not unconstitutionally burden the exercise of Fifth Amendment rights. *See Jenkins*, 447 U.S. at 236-38. The Court noted that the "'threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.'" *Id.* at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973)). Relying on prior decisions, the *Jenkins* Court reasoned that the possibility of impeachment by prior silence does not impermissibly burden the privilege against self-incrimination. *See id.* at 236-38. These prior decisions suggested that a defendant's real dilemma lies in determining whether to testify or not; once a defendant has voluntarily taken the stand, the rule that he must testify fully does not significantly add to this dilemma and is indeed a defendant's obligation, as the privilege against self-incrimination "cannot be construed to include the right to commit perjury." *Id.* at 238 (quoting *Harris v.*

New York, 401 U.S. 222, 225 (1971)). The Court then explained that "[i]n determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice." *Id.* at 238. The Court reasoned that the impeachment use of prearrest silence "enhance[s] the reliability of the criminal process" by giving prosecutors the chance to test a defendant's credibility by asking him to explain prior inconsistencies. *Id.* "Once a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'" *Id.* (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)) (alteration in original).

Jenkins did not, however, address the question at issue in this case, namely, whether the use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment. *See id.* at 236 n.2 (leaving this question unresolved). That use of a defendant's prearrest silence as substantive evidence of guilt is significantly different than the use of prearrest silence to impeach a defendant's credibility on the stand is clear. In *Griffin v. California*, 380 U.S. 609, 615 (1965), the Supreme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's [refusal to testify at trial] or instructions by the court that such silence is evidence of guilt." The Court reasoned that a contrary rule would allow the state to submit as substantive proof of the defendant's guilt his silence by not testifying. *See id.* at 613 ("No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance."). Such proffer of the defendant's refusal to testify as evidence of guilt would impermissibly

penalize the exercise of the privilege against self-incrimination and would "cut[ ] down on the privilege by making its assertion costly." *Id.* at 614.

The circuits that have considered whether the government may comment on a defendant's prearrest silence in its case in chief are equally divided. Three circuits have held that such use violates the privilege against self-incrimination found in the Fifth Amendment, relying principally upon *Griffin*. *See United States* ex rel. *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir.), *cert. denied*, 493 U.S. 969 (1989); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *cf. United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981) ("Whatever the future impact of *Jenkins* may be, we have found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case."; "[W]e are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief."). In *Savory*, the Seventh Circuit explained that because the defendant did not take the stand and because the prosecution referred to the defendant's silence as substantive evidence of guilt, the case did not involve the application of *Doyle* but rather the application of *Griffin*. *See Savory*, 832 F.2d at 1017. The Seventh Circuit reasoned that while *Griffin* involved governmental use of the defendant's silence at trial, "[t]he right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings." *Id.* at 1017. The court therefore concluded that *Griffin*'s prohibition on the use of a defendant's silence as substantive evidence of guilt "applies equally to a defendant's silence

before trial, and indeed, even before arrest." *Id.*[8] In *Coppola*, the First Circuit cited *Raffel* and *Griffin* and reasoned that the "broad rule of law" set forth in those cases "is that where a defendant does not testify at trial it is impermissible to refer to any fifth amendment rights that defendant has exercised." *Coppola*, 878 F.2d at 1567. It therefore held that the prosecution's use of the defendant's prearrest silence in its case in chief violated the Fifth Amendment. *See id.* at 1568. The Tenth Circuit reached the same result in *Burson*: "The general rule of law is that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised. To be sure, exceptions exist to this rule, such as the use of silence for impeachment in certain circumstances, but such exceptions have no applicability to the case before us." 952 F.2d at 1201 (citation omitted).

Three circuits, on the other hand, have reached the opposite conclusion. *See United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States*

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[8] The Seventh Circuit distinguished the *Doyle* line of cases as follows:

> [T]he *Doyle* rule is predicated on the implied promise of the *Miranda* warnings. The cases which have allowed impeachment by silence rely on the fact that the defendant opens himself to impeachment by taking the stand. There is, on the other hand, a constitutional right to say nothing at all about the allegations. While the presence of *Miranda* warnings might provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such a prohibition.

Savory, 832 F.2d at 1017-18 (citations omitted).

v. Oplinger, 150 F.3d 1061, 1066-67 (9th Cir. 1998). In *Rivera*, the Eleventh Circuit, citing *Jenkins*, held that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings." *Rivera*, 944 F.2d at 1568. Although the defendant raised only a due process challenge to the use of her prearrest silence, the Eleventh Circuit found no constitutional infirmity with the use of that silence in the government's case in chief. *See id.* The Fifth Circuit in *Zanabria* held, without citing any cases, that the Fifth Amendment did not protect the defendant's prearrest silence because the silence at issue was not induced by the government. *See Zanabria*, 74 F.3d at 593. The court explained: "The fifth amendment protects against compelled self-incrimination but does not, as Zanabria suggests, preclude the proper evidentiary use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference." *Id.* Most recently, the Ninth Circuit joined the Fifth and Eleventh Circuits in holding that the use of a defendant's prearrest silence as substantive evidence of guilt does not violate the Fifth Amendment. *See Oplinger*, 150 F.3d at 1067. The Ninth Circuit, following the reasoning of Justice Stevens's concurring opinion in *Jenkins*, explained that "the privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." *Id.* at 1066.

We agree with the reasoning expressed in the opinions of the Seventh, First, and Tenth Circuits, and today we join those circuits in holding that the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. Like those circuits, we believe "that application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted

by a suspect who is questioned during the investigation of a crime." *Coppola*, 878 F.2d at 1565. The Supreme Court has given the privilege against self-incrimination a broad scope, explaining that "[i]t can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (footnote omitted); *see* also *Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("[The privilege] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer."); *Hoffman*, 341 U.S. at 486-87 ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."). In a prearrest setting as well as in a post-arrest setting, it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply.

Furthermore, we note that even under the reasoning of Justice Stevens in his *Jenkins* concurrence, the Fifth Amendment would apply to Combs's situation. In *Jenkins*, Justice Stevens agreed with the majority that the Fifth Amendment was inapplicable to the petitioner's claim, but Justice Stevens objected to the majority's reliance on the waiver theory of *Raffel*. *See Jenkins*, 447 U.S. at 241 (Stevens, J., concurring in the judgment). Instead, Justice Stevens would have ruled that the Fifth Amendment does not apply to a precustody context: "When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise

any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent." *Id.* at 243-44 (footnote omitted).

Even assuming that the Fifth Amendment is inapplicable to precustody contexts,[9] the privilege would

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[9] We stress that we do not believe that the Fifth Amendment comes into play only when a defendant is taken into custody, for it would eviscerate the privilege to say that, although a defendant's post-custody silence may not be used as substantive evidence against him, a defendant's precustody silence may. As Justice Marshall explained in his *Jenkins* dissent:

> I confess I find Mr. Justice Stevens' view of the Fifth Amendment incomprehensible. Apparently, under that view, a person's right not to incriminate himself exists only if the government has already attempted to compel him to do so. If no officials have tried to get the person to speak, he evidently has a duty to incriminate himself, because the reporting of crime is a civic duty and the Fifth Amendment is not applicable since the decision to speak or remain silent is, at that time, "voluntary."
>
> But the prohibition against compelled self-incrimination is another way of expressing the right not to incriminate oneself. After all, the only means of compelling a person to incriminate himself is to penalize him if he does not. Of course the voluntary decision to remain silent in the absence of any official compulsion does not "raise any issue under the Fifth Amendment," since there has been no self-incrimination at all. A voluntary decision to speak

still be applicable to Combs, for we agree with the Ohio Supreme Court's finding that Combs was in custody at the time he made the "talk to my lawyer" statement. In *Stansbury v. California*, 511 U.S. 318 (1994), the Supreme Court explained that "[i]n determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" *Id.* at 322 (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983)) (alteration in original). Moreover, in the custody determination, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 324 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)); *see also United States v. Ozuna*, 170 F.3d 654, 658 (6th Cir. 1999) ("Determination of whether an individual is in custody for purposes of applying the *Miranda* doctrine considers 'how a reasonable man in the [individual's] position would

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> also does not implicate the Fifth Amendment because the self-incrimination was not compelled. But to impose a duty to report one's own crime before an official accusation has been made would itself be to compel self-incrimination, thus bringing the Fifth Amendment into play. And, as *Griffin v. California* makes plain, the Constitution also prohibits the government from burdening the right not to incriminate oneself by penalizing silence. In the present case the violation of the Fifth Amendment occurred not when the defendant remained silent, but when that silence was later used against him at his criminal trial.

Jenkins, 447 U.S. at 250 n.4 (Marshall, J., dissenting) (citations omitted).

have understood the situation.'"(quoting *Berkemer*, 468 U.S. at 442) (alteration in original)). Applying that standard to the facts of this case leads to a conclusion that Combs was in custody when Officer Ventre asked him for the second time what had happened. Although *Miranda* warnings are not required prior to routine questioning when officers have no details concerning what happened when they arrive on the scene, *see United States v. Wolak*, 923 F.2d 1193, 1196 (6th Cir.), *cert. denied*, 501 U.S. 1217 (1991), the instant case presents a different situation. Ventre personally took the shotgun away from Combs; he testified that he "pointed [his] weapon at the subject on the ground and ordered him to drop the shotgun" and that he "ordered him several times to drop the shotgun and [Combs] started raising the shotgun toward me." R. at 1042; J.A. at 2670 (Ventre Test.). In addition, ten or fifteen minutes passed from the time Ventre arrived on the scene until the second question. In that time, other officers had arrived and Ventre would surely have had some details about the incident. A reasonable person in Combs's situation could have believed that he was under arrest, and we therefore conclude that Combs was in custody.

Having decided that the privilege against self-incrimination applies to a prearrest situation, an analysis such as the one employed by the Court in *Jenkins* leads us to the conclusion that the use of prearrest silence as substantive evidence of guilt is an impermissible burden upon the exercise of that privilege. First, permitting the use of silence in the government's case in chief would substantially impair the policies behind the privilege. The Supreme Court in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), explained:

> [The privilege against self-incrimination] reflects many of our fundamental values and most noble

> aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Id. at 55 (citations omitted). As the *Jenkins* Court recognized, when the government uses a defendant's prearrest silence for purposes of impeachment, these policies are largely not implicated; every defendant is already under some pressure to testify fully so that the jury does not draw an unfavorable inference from his silence (or partial silence), and a rule permitting a defendant to be impeached on the stand with prior silence does not add substantially to this pressure. If, on the other hand, prearrest silence may be used as substantive evidence of guilt regardless of whether or not the defendant testifies at trial, then the defendant is cast into the very trilemma outlined by the *Murphy* Court. Because in the case of substantive use a defendant cannot avoid the introduction of his past silence by refusing to testify, the defendant is under substantial pressure to waive the privilege against self-incrimination either upon

first contact with police or later at trial in order to explain the prior silence. Perhaps most importantly, use of a defendant's prearrest silence as substantive evidence of guilt substantially impairs the "sense of fair play" underlying the privilege. Unlike in the case of impeachment use, the use of a defendant's prior silence as substantive evidence of guilt actually lessens the prosecution's burden of proving each element of the crime.

We also conclude that the government's use of a defendant's prearrest silence in its case in chief is not a legitimate governmental practice. Unlike the use of silence for impeachment purposes, the use of silence as substantive evidence of guilt does not enhance the reliability of the criminal process. Just as "every post-arrest silence is insolubly ambiguous," *Doyle*, 426 U.S. at 617, there are many reasons why a defendant may remain silent before arrest, such as a knowledge of his *Miranda* rights or a fear that his story may not be believed. The probative value of such silence is therefore minimal. Furthermore, the use of prearrest silence may even subvert the truthfinding process; because it pressures the defendant to explain himself or to suffer a court-sanctioned inference of guilt, the likelihood of perjury is increased. In sum, permitting the use of a defendant's prearrest silence as substantive evidence of guilt would greatly undermine the policies behind the privilege against self-incrimination while adding virtually nothing to the reliability of the criminal process.

In the instant case, Combs clearly invoked the privilege against self-incrimination by telling the officer to talk to his lawyer, thus conveying his desire to remain silent without a lawyer present. Combs never waived this privilege and did not testify at his trial. Therefore, the prosecutor's comment on Combs's prearrest silence in its

case in chief and the trial court's instruction permitting the jury to use Combs's silence as substantive evidence of guilt violated Combs's Fifth Amendment rights.

Defense counsel's failure to object to the unconstitutional use of Combs's "talk to my lawyer statement" clearly fell below an objective standard of reasonableness. Although the contours of the privilege against self-incrimination may sometimes be unclear, that a defendant's silence cannot be used as substantive evidence against him at trial is a fundamental aspect of the privilege. Combs's counsel should have realized that the use of Combs's prearrest silence against him was at least constitutionally suspect[10] and should have lodged an objection on that basis. Counsel's failure to have objected at any point is inexplicable, and we can perceive no possible strategic reason for such failure.[11] Not only did the failure to object ensure that the jury could use Combs's protected silence against him, but it also guaranteed that both the admission of the statement and

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[10] In fact, it appears that Combs's counsel did realize the problems surrounding the use of the "talk to my lawyer" statement. Stidham testified in a deposition that the trial court's instruction on the issue "so astounded us that we were shocked." J.A. at 2928 (Stidham Dep.).

[11] The State argues that the trial court's sua sponte instruction following Officer Ventre's testimony "limited any speculative damage to Combs," so that defense counsel's failure to object was a sound strategic decision designed not to draw any more attention to the matter. Appellee's Br. at 52. However, far from limiting the damage caused by the admission of the statement, the trial court's instruction exacerbated it. The instruction encouraged the jury to use Combs's prearrest silence as substantive evidence of purpose and prior calculation and design — the key issues at trial.

the trial court's instruction would be analyzed on review only for plain error. Counsel's performance with respect to this issue was constitutionally deficient under the *Strickland* standard.

Even if Combs's counsel failed to realize that use of the "talk to my lawyer" statement as substantive evidence of guilt might be unconstitutional, counsel still should have objected to the statement on evidentiary grounds. Ohio Rule of Evidence 401 provides the definition of "relevant evidence": "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ohio R. Evid. 401. Rule 403 provides:

> **(A) Exclusion mandatory.**
> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
>
> **(B) Exclusion discretionary.**
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

Ohio R. Evid. 403. The Ohio Supreme Court concluded that the comments regarding the "talk to my lawyer" statement were improper under these rules, stating:

> Additionally, the "talk to my lawyer" evidence does not relate to or tend to prove prior calculation and design or purposefulness. Combs' comment simply meant that he was exercising his right to counsel and nothing more. Even if this remark was initially

> admissible, Evid.R. 401 and 403 would otherwise invite exclusion from evidence. No justification is apparent for the instruction that the evidence related to either purposefulness or prior calculation and design. Thus, we conclude the trial court erred in allowing this remark into evidence and in instructing the jury to consider the remark in relation to purposefulness and prior calculation and design.

Combs, 581 N.E.2d at 1076.

A reasonable defense attorney would have known that the admission of the "talk to my lawyer" statement was prejudicial to the client and would have objected on the basis of Rule 403. Such an objection would have had at least a likelihood of success, given the Ohio Supreme Court's pronouncement on this issue. A Rule 403 objection to Officer Ventre's testimony could have prevented the erroneous instruction as well as the damaging use of the statement by the prosecution.

3. Defense Counsel's Presentation of Dr. Fisher's Testimony

Combs next alleges ineffectiveness as a result of counsel's preparation of and strategy with regard to Dr. Fisher, the defense's only expert witness. Dr. Fisher testified at the culpability phase regarding Combs's drug and alcohol abuse and his intoxication on the day of the events; on cross-examination, Dr. Fisher expressed the opinion that, although intoxicated, Combs acted purposefully and intentionally. Defense counsel objected to the prosecutor's question, but the objection was overruled. The exchange on cross proceeded as follows:

Q. Dr. Fisher, you have rendered an opinion that at the time, July 15th, the defendant was under the influence, is that correct?

A. That's my opinion, yes.

Q. You are not however saying that the acts he did on that particular day were not done purposely?

MR. STIDHAM: Objection.

THE COURT: Overruled.

A. I certainly am not, no.

Q. So he may have been under the influence or your opinion based on what you were told he was under the influence but at the same time he was acting intentionally and purposely when he acted as he did on July 15th; is that correct?

MR. STIDHAM: Objection.

THE COURT: Overruled.

A. I certainly believe that he was, yes.

R. at 1183; J.A. at 2586 (Fisher Test.).

On redirect, defense counsel again attempted to show that intoxication has an effect on one's ability to make judgments. Defense counsel elicited Dr. Fisher's testimony that "it would be my conclusion psychologically that [Combs's] judgment was impaired by what was happening to him and what he was ingesting." R. at 1187; J.A. at 2590 (Fisher Test.). On re-cross, however, Dr. Fisher gave the same testimony regarding intent:

> Q. But, Doctor, was it so impaired that he could not -- wasn't so impaired that he could not form this intent?
>
> A. That is correct, yes.

R. at 1188; J.A. at 2591 (Fisher Test.). The prosecutor then emphasized Dr. Fisher's testimony regarding intent three times in closing arguments.[12] Combs argues that counsel's failure to anticipate, suppress, prepare for, object to, or avoid repetition of this damaging testimony rendered his performance constitutionally deficient.

Although Combs's counsel's decision to present Dr. Fisher's testimony may be considered a strategic one, it was a decision made without undertaking a full investigation. *Cf. Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when

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[12] Combs's counsel chose to put Dr. Fisher on the stand again at the sentencing phase, and Dr. Fisher testified, this time on direct, that Combs acted with intent. Dr. Fisher stated: "Well, it is my opinion that a person with Mr. Combs' exact history of drug and alcohol abuse, drug and alcohol ingestion, and treatment would still be able to control ordinary behaviors, plan behavior in a purposeful way, carry out behavior in a purposeful way. I think his judgment would have been a continuated [sic] to an extent and I think that one would see perhaps a greater degree of impulsivity in his behavior but I think that the basic issue of control would still be intact with his history." R. at 1385; J.A. at 2598 (Fisher Test.).

the attorney has failed to investigate his options and make a reasonable choice between them."), *cert. denied*, 503 U.S. 952 (1992). At trial, Dr. Fisher did present several aspects of Combs's history that were psychologically relevant, such as Combs's state of despondency, his difficult past, his history of severe drug and alcohol abuse, and his stormy relationship with Peggy Schoonover. R. at 1176-78; J.A. at 2579-81 (Fisher Test.). Additionally, Fisher supported the contention that Combs was under the influence when he shot the victims. However, Stidham testified that defense counsel put Fisher on the stand in an effort "to establish that Combs could not act purposely and intentionally because of his diminished capacity," and Stidham admitted that he was "surprised" when Fisher testified to the opposite. J.A. at 2920 (Stidham Dep.). Fisher's opinion regarding whether Combs lacked the requisite intent to commit the crimes was crucial to the defense theory; defense counsel's failure to have questioned Fisher in this regard prior to trial is inexcusable. Defense counsel should have known Fisher's opinion on this ultimate issue and should have prepared accordingly.

Regardless of whether Combs's counsel should have known or instead actually knew Fisher's opinion regarding Combs's intent, however, counsel's decision to put him on the stand was objectively unreasonable. In Ohio, evidence of voluntary intoxication "may be considered in determining whether an act was done intentionally or with deliberation or premeditation." *Ohio v. Fox*, 428 N.E.2d 410, 412 (Ohio 1981). Thus, establishing that a defendant was intoxicated when he committed the crime in question is not, in and of itself, helpful; the evidence must also lead the factfinder to an inference that intoxication deprived the defendant of the ability to form intent. Indeed, Stidham testified that the defense presented Fisher in order to establish that Combs

could not have been acting purposefully. Fisher's testimony directly contradicted the sole defense theory that Combs lacked the requisite intent to commit murder. Although defense counsel presented substantial testimonial evidence that Combs was in fact intoxicated at the time of the shootings, this testimony was rendered worthless when the defense's own expert testified that Combs's intoxication did not legally excuse his crime. Furthermore, not only did Fisher's testimony destroy any hope of a successful intoxication defense, but it also helped the prosecution to establish one of the elements of its case in chief. Quite simply, this testimony was completely devastating to the defense, and counsel's decision to present it was objectively unreasonable.

4. Defense Counsel's Overall Performance at the Culpability Phase

We next proceed to assess defense counsel's overall performance throughout the culpability phase of Combs's trial. We acknowledge that defense counsel presented significant evidence that Combs was intoxicated on the day of the shootings. However, the errors that we have identified are fundamental errors that were severely damaging to Combs's defense. In fact, we believe that each of the errors that we have identified is independently sufficient to warrant a conclusion that Combs's counsel's performance was constitutionally deficient. However, these errors were compounded by other failures on the part of defense counsel.

For example, Combs's counsel failed to investigate and to present available physical evidence of Combs's intoxication on the day of the shootings. Combs argues that, had defense counsel investigated this matter, they would have found out from his mother that "when [she] got the car back [from the police after their investigation]

there were wine cooler bottles, and beer cans in the car" and that "[a] cooler in the back still contained two beers." J.A. at 1304 (Aff. of Geraldine Combs). At trial, Officer Zompero, who is a police criminalist, testified that he had conducted a search of Combs's car, but had not found any kind of container that would be used to hold alcohol such as a beer can, wine cooler can, or whiskey bottle. R. at 1081; J.A. at 2700 (Zompero Test.). Investigating the presence of alcohol containers in the car would have enabled defense counsel to present some corroborating physical evidence of Combs's intoxication,[13] and would also have enabled counsel to respond to Zompero's allegedly inaccurate testimony.

Additionally, Combs's counsel made no attempt to redact portions of a videotaped testimony that may have been prejudicial to Combs. At trial, the videotaped testimony of Tony Liming, who was then fifteen years old, was presented by the prosecution.[14] Liming was with Combs when he obtained a gun on the day of the shootings; he also testified as to Combs's use of drugs and alcohol on a regular basis and on the day in question. At one point, Stidham asked Liming what his feelings toward Combs were. Liming answered: "He is, I guess I liked him, I mean I liked him. He like did stuff, stole stuff from my mom and I didn't like that." R. at 944; J.A. at 2631 (Tony Liming Test.). Combs argues that counsel should have sought to have this "highly prejudicial 'other acts'" evidence redacted prior to trial pursuant to Ohio

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[13] Although defense counsel did present substantial testimonial evidence of Combs's intoxication, no corroborating physical evidence was presented. Therefore, the evidence of alcohol containers would not have been cumulative.

[14] Liming was questioned on direct by Stidham.

Rule of Evidence 404(B),[15] and we agree. The statement is likely excludable under Rule 404(B); it does not go to any permissible purpose, and it might tend to leave the jury with an overall bad impression of Combs's character. Considering the potential prejudice from the statement, counsel clearly erred by failing to seek redaction.

Counsel's overall performance is particularly shocking given the fact that this case involves the death penalty. *Strickland* instructed that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688. ABA Standard 4-1.2(c) states that "[s]ince the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused." ABA Standards for Criminal Justice Prosecution Function and Defense Function 120 (3d ed. 1993).

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[15] Ohio Rule of Evidence 404(B) reads: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." OHIO R. EVID. 404(B) (Banks-Baldwin 1995).

The Ohio Supreme Court has instructed that Rule 404(B) "must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *Ohio v. Broom*, 533 N.E.2d 682, 686 syllabus para. 1 (Ohio 1988), *cert. denied*, 490 U.S. 1075 (1989).

5. Prejudice

In order to establish prejudice, Combs "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. He must instead show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt about his guilt.[16] *See id.* at 695. The defense theory was that Combs's intoxication rendered him unable to act with purpose or prior calculation and design, and yet defense counsel made two crucial errors that substantially undercut this theory. We conclude that each of these errors is sufficiently prejudicial to satisfy the *Strickland* standard.

Presentation of Dr. Fisher's testimony is perhaps the most devastating error. The testimony of the sole defense expert that Combs, although intoxicated, nevertheless acted with purpose and intent was obviously damaging to the defense. Furthermore, Dr. Fisher's testimony provided the State with its most powerful evidence of purpose. R. at 1226-27; J.A. at 2744-45 (State's Closing Argument at Culpability Phase) (naming Dr. Fisher's testimony first in connection with the purpose element).[17]

Defense counsel's failure to object to the use of Combs's "talk to my lawyer" statement was similarly

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[16] Guilt means guilt of the underlying offenses; Combs must therefore show not that a factfinder would have had a reasonable doubt about his culpability for the killings, but rather that a factfinder would have had a reasonable doubt about his purpose or prior calculation and design.

[17] As Combs points out, the district court acknowledged that Fisher's testimony was prejudicial. J.A. at 132 (Dist. Ct. Op.).

damaging. Just as Dr. Fisher's testimony partly relieved the State of its burden of proof on an element of the offense, the State strategically used Combs's protected silence as evidence that Combs was acting rationally, and thus with purpose and prior calculation, after the shootings; the trial court's instruction encouraged the jury to make that inference.

Of course, the State presented other evidence of Combs's purpose and prior calculation and design. As the Ohio Supreme Court pointed out:

> Combs spent a considerable part of the afternoon of the murders searching for a shotgun. He asked two people for a shotgun, and eventually drove over eighty miles before returning to Cincinnati with a shotgun. The evidence indicates he stole the shotgun he used. After he drove back to Cincinnati, he confronted Joan and Peggy and initiated a car chase over several blocks, eventually cornering them at the Holiday Park Tower office building. He deliberately knocked out a window in their car and fired a shotgun into each woman's head at close range. Those facts alone establish both purposefulness and prior calculation and design.

Combs, 581 N.E.2d at 1076. However, Combs offered an alternative reason for his search for a gun; rather than spending the afternoon searching for the means to commit two murders, Combs suggested that he was searching for a means to kill himself. There was evidence that Combs was contemplating suicide at the time. One witness testified that Combs sounded suicidal just days before the incident, and another witness testified that just before the shootings, Combs said that he was going to be with his father, who was dead. R. at 1192; J.A. at

2612 (Charles Hogue Test.); R. at 942 (Tony Liming Test.). Combs also argued that the car chase just prior to the shootings was not an effort to hunt the two women down, but rather an effort to talk with Peggy Schoonover after other channels of communication had been cut off.

The two critical errors by defense counsel bolstered the State's case and made Combs's explanation of the events seem less likely. Without Fisher's testimony and without the use of Combs's "talk to my lawyer" statement, the State's evidence of purpose and prior calculation and design would have been much weaker. We therefore conclude that absent defense counsel's errors, there is a reasonable probability that the jury would have concluded that the State did not meet its burden of proving the two contested elements, and thus that the jury would have had a reasonable doubt about Combs's guilt.

Federal habeas relief is available to petitioners in state confinement as a result of a proceeding that was rendered fundamentally unfair by a violation of the Constitution, laws, or treaties of the United States. *See Norris*, 146 F.3d at 323 (citing *Estelle v. McGuire*, 502 U.S. 62, 68 (1991)). The Supreme Court has explained that "[a]n ineffectiveness claim, . . . as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged." *Strickland*, 466 U.S. at 697. Combs has satisfied both prongs of the *Strickland* test, and in so doing he has demonstrated that his "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*,

466 U.S. at 687. He is therefore entitled to a conditional grant of habeas relief.[18]

C. Trial Errors Identified by the Ohio Supreme Court

In its review of Combs's conviction and sentence, the Ohio Supreme Court found that several trial court errors had been committed, although that court determined that these errors did not warrant reversal. Because Combs will in all probability be retried for these killings, we will now briefly discuss the errors identified by the state court so that these errors will not be repeated.

1. Improper Penalty Phase Jury Instruction

At the conclusion of Combs's sentencing hearing, the trial court instructed the jury on all seven statutory mitigating factors, rather than just the two raised by defense counsel at the hearing. The instruction read:

> What are mitigating factors? The statute provides certain mitigating factors, some of which you may not apply to this hearing. Mitigating factors are factors that while they do not justify an excuse or justify or excuse the crime of aggravated murder, nevertheless may be considered by you as extenuating, lessening, weakening, excusing to some extent or reducing the degree of the defendant's blame. You are to weigh as mitigating factors as you may deem applicable in this case the nature and circumstances of the offense, the

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[18] No harmless error analysis is necessary for claims of ineffective assistance of counsel. *See Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995).

history, background and character of the defendant, and the following factors which are mentioned by way of illustration and not for the purpose of limiting your consideration.

These seven mitigating factors are defined by statute as follows; number 1, whether the victim of the offense induced or facilitated it.

Number 2, whether it is unlikely that the offense would have been committed but for the fact the defendant was under duress, coercion, or strong provocation.

Number 3, whether at the time of committing the offense the defendant because of a mental disease or defect lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Number 4, the youth of the defendant.

Number 5, the defendant's lack of significant history of prior criminal convictions and delinquency adjudications.

Number 6, if the defendant was [a] participant in the offense but not the principal offender, the degree of the defendant's participation in the offense and the degree of the defendant's participation in the acts which led to the death of the victim.

And number 7, any other factors that are relevant to the issue of whether the defendant should be sentenced to death.

> Keep in mind that all of these specific factors may not be present in this case nor need they all be present before you can find that the aggravating circumstance is not sufficient beyond a reasonable doubt to outweigh the factors in mitigation of the sentence of death. Likewise the existence of any of the mitigating factors I have described to you does not preclude or prevent the imposition of a sentence of death if you find that the aggravating circumstance still does outweigh the mitigating factors by proof beyond a reasonable doubt.

R. at 1434-36; J.A. at 2804-06.

This instruction was clearly improper under Ohio law. In *Ohio v. DePew*, 528 N.E.2d 542 (Ohio 1988), *cert. denied*, 489 U.S. 1042 (1989), the defendant contended that an instruction on all mitigating factors, including ones inapplicable to the case at hand, impermissibly focuses the jury's attention on the absence of mitigating factors. *See id.* at 557. The court held that "[i]f the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution." *Id.*; *see also Ohio v. Bey*, 709 N.E.2d 484, 495 (Ohio), *cert. denied*, --- U.S. ---, 120 S. Ct. 587 (1999); *Ohio v. Keith*, 684 N.E.2d 47, 65 (Ohio 1997), *cert. denied*, 523 U.S. 1063 (1998); *Ohio v. Garner*, 656 N.E.2d 623, 631 (Ohio 1995), *cert. denied*, 517 U.S. 1147 (1996); *Ohio v. Grant*, 620 N.E.2d 50, 68 (Ohio 1993), *cert. denied*, 513 U.S. 836 (1994). On direct review of Combs's conviction, the Ohio Supreme Court cited *DePew* and explained that the reference to statutory mitigating factors not raised by the evidence was erroneous. *See Combs*, 581 N.E.2d at 1079. The court found, however, that the error did not require reversal because defense

counsel induced the error by proposing the improper instruction. *See id.*

2. Improper Characterization of the Nature and Circumstances of the Offense as a Nonstatutory Aggravating Circumstance

The Ohio Supreme Court also concluded that the State erred by focusing its closing remarks on the victims' mental anguish prior to death, thereby converting the nature and circumstances of the offense into a nonstatutory aggravating circumstance. Under Ohio law, although prosecutors in the penalty phase of a capital case may properly refer to the nature and circumstances of the offense, it is improper to characterize that evidence as a nonstatutory aggravating circumstance. *See, e.g., Ohio v. Gumm*, 653 N.E.2d 253, 262-63 (Ohio 1995), *cert. denied*, 516 U.S. 1177 (1996); *Ohio v. Landrum*, 559 N.E.2d 710, 719 (Ohio 1990), *cert. denied*, 498 U.S. 1127 (1991); *Ohio v. Davis*, 528 N.E.2d 925, 931 (Ohio 1988), *cert. denied*, 488 U.S. 1034 (1989).

It is undisputed that the only aggravating circumstance listed in § 2929.04 for which Combs was convicted is that "the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." Ohio Rev. Code Ann. § 2929.04(A)(5) (Banks-Baldwin 1997). At the sentencing hearing, however, the State made the following closing argument:

> Can you imagine the terror of that? A gun right to your head, was she [Joan] thinking of her husband, who was going to take care of him? Was she thinking about her childhood? Was she thinking about her daughter take me but spare Peggy? That's the aggravating circumstance, what

she went through. Or maybe she started to pray, we don't know. He won't tell us.

. . . .

. . . What did she [Peggy] think when this now hot steal [sic] pressed against the back of her head, she knew she too wasn't going to be given any mercy. What went through her mind, what was she thinking? Was she thinking of little Joey, who's going to take care of him, grandma is gone, I'm going to be gone, who's going to raise my little boy. And then came the pull of that second trigger, and she's gone. That's the aggravating circumstance, that's what you put in your one hand and even if you do find some mitigation and all that that the defendant told you, weigh that.

. . . .

. . . What weighs more, these two totally good lives or the defendant's life in the fast lane?

R. at 1404-06; J.A. at 2783-85.

The Ohio Supreme Court on direct review of Combs's case concluded that these prosecutorial comments were erroneous as a matter of state law. *See Combs*, 581 N.E.2d at 1077. The court explained:

> After reading his entire argument, we conclude that the prosecutor did err. The prosecutor did improperly suggest that how the victims were killed and the suffering and mental anguish the victims endured was an aggravating circumstance. Improperly injecting nonstatutory aggravating circumstances is error. By continually

> referring to what the victims were thinking, the prosecutor engaged in gross speculation.

Id. (citation omitted). Although the Ohio Supreme Court found that these comments did not warrant reversal, the State should avoid such speculation on retrial.

III. CONCLUSION

Based on the preceding analysis, we conclude that Combs's trial counsel rendered constitutionally ineffective assistance at the culpability phase of Combs's trial. We therefore **REVERSE** the district court's judgment and **REMAND** the case to the district court with instructions to issue a writ of habeas corpus unless the State of Ohio retries Combs within a reasonable period of time.

CONCURRING IN PART, DISSENTING IN PART

ALAN E. NORRIS, Circuit Judge, concurring in part and dissenting in part.

I concur with the majority's decision in Part II.B.3 and agree that a writ of habeas corpus should be issued on this ground. Because petitioner did not argue that introduction of his "talk to my lawyer" statement violated his right to remain silent, I respectfully dissent from Part II.B.2 of the majority's opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4369

RONALD DEAN COMBS, Petitioner-Appellant,

v.

RALPH COYLE, Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 95-00733--Sandra S. Beckwith, District Judge.

[Filed: February 23, 2000]

Before: NORRIS, DAUGHTREY, and MOORE, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4369

RONALD DEAN COMBS, Petitioner-Appellant,

v.

RALPH COYLE, Respondent-Appellee.

[Filed: March 28, 2000]

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing filed by the appellee,

It is **ORDERED** that the petition for rehearing be, and it is hereby is, **DENIED**. The panel members each adhere to their opinions.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-95-733

RONALD DEAN COMBS, Petitioner

v.

CARL ANDERSON, WARDEN, Respondent.

Filed: October 23, 1997

OPINION and ORDER

Petitioner Ronald Dean Combs brings this action under 28 U.S.C. §2254 for a writ of habes corpus. This matter is before the Court on the petition, appendix to the petition, return of writ, appendix to the return of writ, and traverse.

I. History

On February 17, 1988, a Hamilton County, Ohio jury convicted Petitioner Combs of the July 15, 1987, aggravated murders of Peggy Schoonover and her mother, Joan Schoonover. Peggy Schoonover was the mother of Petitioner's son. The Ohio Supreme Court has summarized the facts surrounding the murders as follows:

> Around 4:00 p.m. on July 15, 1987, Peggy Schoonover and her mother, Joan Schoonover, left work near Fourth and Sycamore Streets in downtown Cincinnati. Father Robert Horine, an

Episcopal priest and co-worker, saw a red car speed through the intersection and come to a screeching halt, just missing him.

Peggy told Father Horine she knew the driver of the red car and that she was ready for him, showing Father Horine a can of mace. Joan and Peggy then got into Joan's blue-gray Cougar and drove away.

Moments later, at an exit ramp near West Eighth Street and Linn Street, Robert Scalf saw a "brown Nova" blocking a gray Cougar. The "Nova" then drove backwards down an exit ramp, turned completely around, and chased the Cougar.

Shortly thereafter, at Eighth and Linn, John Hughes saw a Cougar and a brown car, tires screeching, pull into the Holiday Park Tower parking lot. The brown car blocked the Cougar and later pulled alongside. The driver of the Cougar, a woman, was hollering, waving her hands, and honking the horn. Hughes saw a man get out of the brown car and hit the Cougar's passenger window three or four times with a shotgun, knocking out the glass. This man then put the shotgun up to his shoulder and fired twice into the Cougar. Thereafter, the man got back into his car, and Hughes saw a deputy sheriff, shouting, run up behind the Cougar.

Deputy Sheriff James Neil jogged over to where two cars had raced into Holiday Park Tower parking lot. When he arrived, he saw Ronald Dean Combs, defendant-appellant, holding a long gun, fire two shots through the passenger window of a Cougar. Combs then returned to his car and got

in, but left the door open. Neil shouted five or six times to Combs to "freeze, halt, stop." Combs responded, "You are going to have to shoot me or you are going to have to kill me."

Combs made "an aggressive move," and Neil shot at Combs twice. Combs, still holding the shotgun, got out of his car and faced Neil. Neil shot at Combs four more times, then retreated to reload.

Before Neil returned, Cincinnati police officer Douglas Ventre arrived and found Combs, wounded, sitting on the ground, but holding a shotgun. He ordered Combs to drop the shotgun, but Combs raised the shotgun towards Ventre, then "ran out of gas" and lowered the shotgun into his lap. Ventre ran to Combs, grabbed the shotgun, pulled it away, and asked Combs what happened. Combs replied, "the guy shot me." Later, as Combs was placed into an ambulance, Ventre asked again what happened. Combs "told me to talk to his lawyer."

Medical personnel and Ventre found three live shotgun shells taped to Combs' body. Combs was abusive, nasty, and uncooperative with responding medical personnel, but he did not appear to be under the influence of alcohol. His eyes looked clear, pupils were reactive, and his speech appeared normal.

Combs underwent extensive treatment for his gunshot wounds. His right arm was amputated above the elbow, his left was partly paralyzed. Early the next morning, after an operation, Combs asked a nurse what had happened to "the two bitches that I shot." When Leigh Ann Wright, a

recovery room nurse, told Combs, "they're dead," Combs responded, "serves the Goddamned whores right." Peggy had been Combs' girlfriend.

Police found Joan and Peggy dead from shotgun wounds to the right side of their heads. At trial, Combs did not contest that he fired the two fatal shotgun blasts.

To support prior calculation and design, the prosecutor presented evidence of Combs' efforts to obtain a shotgun on the day of the murders. Combs asked to borrow a shotgun from Anthony Liming, his fifteen year-old cousin. Tony had none, so they both drove to Mt. Orab, over forty miles away, and Combs asked Tim Liming, Tony's uncle, to lend him a shotgun. Tim refused, and ultimately Combs used a shotgun stolen from the house or Richard Liming, Tony's father. When Combs got the shotgun, at about 3:00 p.m., he drove at high speed back to Cincinnati.

At trial, Combs argued he was too intoxicated from alcohol, marijuana, and pills to formulate the intention to kill Joan and Peggy or to plan and calculate their deaths.

Michael Eversoll, Combs' cousin, testified that on July 13, Combs started drinking heavily, smoking marijuana, and taking pills, and continued to do so through noon, July 15. Two witnesses, Tony and Tim Liming, saw Combs drink, smoke marijuana, or take pills on the afternoon of July 15. Tim Liming described Combs' eyes as glassy and his face as waxy. Combs' sister, who saw Combs around noon on July 15, and a neighbor who saw

> Combs between 1:00 and 2:00 p.m., thought he was definitely under the influence of drugs and alcohol.
>
> Dr. Roger Fisher, a clinical psychologist, found that Combs had a history of severe drug addiction. Dr. Fisher believed that Combs' judgment was substantially impaired and that he was under the influence of drugs and alcohol when he killed Joan and Peggy. However, Fisher agreed that Combs "was acting intentionally and purposefully."

State v. Combs, 62 Ohio St.3d 278, 278-80 (1991).

Following a hearing on February 22, 1988, the trial jury recommended a sentence of death. On March 1, 1988, the trial court filed an opinion adopting the jury's recommendation and sentencing Petitioner Combs to death for each of the counts of aggravated murder.

II. Procedural History

Petitioner has been unsuccessful in his efforts to have his convictions overturned in the Ohio courts. An outline of the procedural history in the Ohio courts follows.

Petitioner Combs appealed his aggravated murder convictions and his death sentence to the Court of Appeals for Hamilton County. He assigned the following errors:

First Assignment of Error. The trial court committed plain error in incorrectly instructing the jury that it was permitted to consider the fact that Appellant advised police to talk to his lawyer as evidence of the existence of the essential elements of purpose and prior calculation

and design, in violation of Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and of Art. I Sec. 10 of the Ohio Constitution;

Second Assignment of Error. The Appellant was denied the effective assistance of counsel by the failure of trial counsel to object to the instruction of the trial court to the jury to the effect that the assertion of Constitutional rights could be considered as evidence of the existence of essential elements of the offense for which the accused was on trial, in violation of his right to counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States, and Art. 1 Sec. 10 of the Ohio Constitution:

1. The fact that a defendant in a capital criminal case advises police to talk to his lawyer may not be considered by a jury for any purpose, and an instruction that the jury may consider such a statement as evidence of the essential elements of purpose and/or prior calculation and design is gross constitutional error and requires reversal;

2. The instruction that the jury is permitted to use a reference by a defendant to an attorney when questioned by a police officer as evidence of the existence of essential elements of the offense is plain error, and may be noticed on appeal even absent a defense objection;

3. The failure of defense counsel to object to an instruction of the trial court which advises the jury that the assertion of constitutional rights may be considered evidence of the existence of essential elements of the offense, constitutes a denial of the right to the effective assistance of counsel secured

to the accused by the Ohio and United States Constitutions;

Third Assignment of Error. The trial court erred to the prejudice of Appellant in establishing a date for the execution of the sentence of death before expiration of the consecutive three-year sentences imposed on the two firearm specifications under R.C. 2929.71:

1. Three-year sentences for possession of a firearm during the commission of felonies must be served prior to the serving of the sentence for the underlying felonies, and where a defendant is sentenced to death, and to two consecutive three year terms of imprisonment for the use or carrying of a firearm during the commission of the principal offenses, the two three year firearm sentences must be served prior to execution of the death sentence, and it is error to set a date for execution of the death sentence prior to the expiration of the six years imposed upon the firearm specifications;

Fourth Assignment of Error. The trial court committed plain error in instructing the jury at the penalty phase of the proceedings as to each and every statutory mitigating factor, whether or not it applied to the facts and circumstances of the case;

Fifth Assignment of Error. The trial court committed plain error to the prejudice of Appellant by permitting the prosecution to convert the absence of certain statutory mitigating factors into nonstatutory aggravating factors during penalty phase argument, which prejudiced Appellant's right to reliability in the determination of whether he should be executed.

1. It is the defendant in a capital case who has the right to present and argue the mitigating factors. If he does not, no comment on any factors not raised by him is permissible; the better practice is for the trial court not to refer in instructions to statutory mitigating factors not raised by the defendant;

Sixth Assignment of Error. The trial court committed plain error, to the prejudice of Defendant-Appellant by permitting the prosecutor to argue, at the penalty phase, that the aggravating circumstance was the terror and horror felt by the victims, rather than a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender, and other prejudicial arguments, in violation of Appellant's right to due process of law and to be protected against cruel and unusual punishment, secured to him by the Eighth and Fourteenth Amendments to the Constitution of the United States, and by Art.1, Sections 9 and 10 of the Ohio Constitution;

Seventh Assignment of Error. The Defendant-Appellant was denied the effective assistance of counsel by the failure of his counsel to object to the improper argument of the prosecution at the penalty phase of the proceedings, constituting a violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the concomitant provisions of the Ohio Constitution:

1. Any egregious error in the penalty phase of a death penalty proceeding, including prosecutorial misconduct, will be cause to vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to R.C. 2929.06;

2. Only the aggravating factor for which the accused has been indicted may support a decision for death; resort to nonstatutory aggravating factors requires reversal of the death sentence;

3. Arguments for the death sentence which focus on the nature and circumstances of the offense, i.e., the gruesomeness and heinousness of the murders, and which focus upon the suffering experienced by the victims and the victims' families constitute prejudicial, reversible, constitutional error, requiring reversal of the death sentence obtained thereby;

4. Where defense counsel in a capital case fail to object to improper argument of the prosecutor during penalty phase argument, the accused has been deprived of the effective assistance of counsel, to which he has a right pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I. Sec. 10 of the Ohio Constitution;

5. Where the state secures a death sentence by use of grossly prejudicial, unconstitutional penalty-phase argument, and no defense objection was interposed, the error is plain error, and will be noted on review, and reversal will result;

Eighth Assignment of Error. The trial court erred to the prejudice of Appellant in imposing a death sentence after a process which unconstitutionally narrowed statutory mitigating factors out of existence, thus preventing the meaningful weighing of such factors in the sentencing decision, and in considering the nature and circumstances of the case as aggravating, in violation of

Appellant's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States and under the Ohio Constitution:

1. One on trial for his life is entitled to meaningful consideration of relevant mitigating factors, and where the trial court rejects or improperly weighs such factors because they do not constitute a defense to the crime (which would render the accused not guilty), then that right has been denied, to his prejudice;

2. The nature and circumstances of the offense are not a statutory aggravating circumstance, and where the trial court finds that the accused should die, because of the manner in which he has committed the crime, rather than because the statutory aggravating factor outweighs mitigation beyond a reasonable doubt, then the resulting death sentence must be vacated;

Ninth Assignment of Error. The trial court committed prejudicial error in excluding from the evidence the hospital record concerning the blood test administered by the treating hospital, which revealed the ingestion of alcohol and drugs and which tended to support Appellant's intoxication defense, in violation of Appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and the concomitant provisions of the Ohio Constitution:

1. Properly authenticated hospital records of the results of blood tests which are administered for the purpose of diagnosis or treatment are admissible, and where the results of such tests support the intoxication defense of a capital defendant, the refusal of the trial court to admit

such test results is grossly and prejudicially erroneous, contrary to the Rules of Evidence, and a violation of due process under both the Ohio and federal Constitutions;

2. The erroneous exclusion by a trial court of evidence of a mitigating factor is prejudicial to a capital defendant, and the imposition of the death sentence thereafter constitutes a violation of the offender's constitutional privilege against cruel and unusual punishment;

Tenth Assignment of Error. The trial court committed plain error in permitting state witness Leigh Ann Wright to testify to certain statements purportedly made by Appellant, denying Appellant the right to due process of law under the Fourteenth Amendment to the Constitution of the United States, and Art. I, Sec. 16 of the Ohio Constitution;

Eleventh Assignment of Error. Appellant was denied the effective assistance of counsel due to the failure of trial counsel to file a motion to suppress his statement to nurse Wright as an involuntary statement:

1. The admission of an involuntary confession, in the absence of a defense motion to suppress that confession, is plain error, requiring reversal of a resulting conviction;

2. A criminal defendant has been denied his constitutional right to the effective assistance of counsel where defense counsel fail to file a motion to suppress an involuntary confession which arguably could resolve one or more issues in the case, in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the

United States, and Art. I, Sec. 10 of the Ohio Constitution;

Twelfth Assignment of Error. The death sentence visited upon Appellant violates the Eighth and Fourteenth Amendments in that it is disproportionately severe when compared to sentences in similar cases:

1. The Eighth and Fourteenth Amendments to the Constitution of the United States prohibit sentences that are disproportionately severe in relation to the crime committed, sentences visited upon others for the same crime in the same and other jurisdictions;

Thirteenth Assignment of Error. Appellant's sentence offends the equal protection clause of the Fourteenth Amendment in that in Hamilton County the death penalty is reserved, almost exclusively, for those who are convicted of the aggravated murder of white people:

1. Even a constitutional law may be unconstitutionally applied, and where whether one is sentenced to death depends upon the race of his victim, and those who kill whites are sentenced to death almost exclusively, and those who kill blacks are almost uniformly spared, then the guarantee to the equal protection of the laws has been violated by the sentencing of any offender to death;

Fourteenth Assignment of Error. The trial court erred to the prejudice of Appellant in imposing the death sentence, for the Ohio death penalty statutes are unconstitutional, violating the Eight Amendment proscription of cruel and unusual punishments, the

Fourteenth Amendment guarantees to due process of law and the equal protection of the laws, and also violating the concomitant provisions of the Ohio Constitution:

(A) The death penalty is so totally without penological justification that it results in the gratuitous infliction of suffering, and, consequently, there is no rational state interest served by the ultimate sanction;

(B) Both locally, statewide and nationally, the death penalty is inflicted disproportionately upon those who kill whites as opposed to those who kill blacks, and even within Hamilton County, the death penalty is selectively imposed, rendering the penalty as applied in Hamilton County arbitrary and capricious on the one hand, and the product of racial discrimination on the other;

(C) The use of the same operative fact to first elevate what would be "ordinary" murder to aggravated murder, and then to capital, death-eligible aggravated murder permits the state (1) to obtain a death sentence upon less proof in a felony murder case than in a case involving prior calculation and design, although both crimes are ostensibly equally culpable under the Revised Code, and (2) fails to narrow the capital class to the murderers for whom the death penalty is constitutionally appropriate;

(D) The requirement that a jury must recommend death upon proof beyond a reasonable doubt that the aggravating circumstances outweigh only to the slightest degree the mitigating circumstances renders the Ohio capital statutes quasi-mandatory and permits the execution of an offender even

though the mitigating evidence falls just short of equipoise with the aggravating factors, with the result that the risk of putting someone to death when it is practically as likely as not that he deserves to live renders the Ohio capital process arbitrary and capricious, and, in the absence in of a requirement that, before death may be imposed, aggravating factors must substantially outweigh mitigating factors, unconstitutional;

(E) The Ohio capital statutes are constitutionally infirm in that they do not permit the extension of mercy by the jury even though aggravating factors may only slightly outweigh mitigating factors:

1. The Ohio capital statutes are unconstitutional because they require the death sentence and fail to permit the jury to recommend mercy even though the aggravating factors only margin-ally outweigh the mitigating factors, and in spite of the fact that there may be factors strongly suggesting the appropriateness of a penalty less than death in a given case;

(F) The provisions of Crim. R. 11(C)(3) permitting a trial court to dismiss specifications upon a guilty plea only under the nebulous and undefined concept "in the interests of justice"(1) needlessly encourages guilty pleas and the concomitant waiver of the right to jury, to compulsory process and to confrontation and (2) reintroduces the possibility that the death penalty will be imposed arbitrarily and capriciously:

1. The provisions of Crim. R. 11(C)(3) needlessly encourage the entry of guilty

pleas and the concomitant waivers of the right to jury trial, confrontation and compulsory process, and render the death penalty statutes unconstitutional;

2. The possibility that capitally-indicted capital defendants can avoid the death penalty by pleading guilty where the trial judge dismisses the capitally-necessary specifications on the undefined standard "in the interests of justice" reintroduces the element of arbitrariness and caprice into the Ohio capital sentencing scheme and renders the statutes unconstitutional;

(G) The Ohio capital sentencing scheme is unconstitutional because it provides no standards for sentencing or review at several significant stages of the process and consequently death sentences are imposed, and reviewed, without sufficient statutory guidance to juries, trial courts and reviewing courts to prevent the unconstitutional arbitrary and capricious infliction of the death penalty:

1. To be constitutional, a state death penalty scheme must provide standards to guide the sentencer in the reasonable exercise of the awesome power entrusted to it, in order to avoid the influence of arbitrariness and caprice in the sentencing decision, and where the statutes provide no meaningful standards to guide the sentencer, and reviewing courts, no death sentence imposed under such a system may constitutionally stand;

2. There are no standards set forth for the guidance of juries, trial judges, or reviewing courts in the weighing of aggravating and mitigating factors sufficient to ensure that any given death sentence has been constitutionally imposed;

Fifteenth Assignment of Error. The trial court erred in imposing the death sentence because the jury that convicted Appellant and recommended the death sentence was improperly constituted in violation of Appellant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the Constitution of the Untied States, and under the Bill of Rights to the Ohio Constitution, in addition to constituting a violation of Ohio statutory law:

1. A death sentence recommended by a jury from service on which one or more veniremen were excused because of their views concerning capital punishment cannot stand unless it affirmatively appears on the record that each such venireman excused for cause unequivocally indicates that his scruples against capital punishment will automatically prevent him from recommending the death penalty and/or that such views will render him unable to return a verdict of guilty no matter what the evidence, and that he is prevented by his scruples from following the instructions of the court and considering fairly the imposition of the death sentence;

2. Even the unconstitutional exclusion from a jury of but one venireman contrary to law mandates reversal of the death sentence rendered by that jury, and the error is not cured by the totality of the circumstances, the failure of defense counsel to

object to the improper exclusion, the failure to exercise peremptories, nor the opportunity of the trial judge to assess the credibility of the venireman;

Sixteenth Assignment of Error. The trial court erred in instructing the jury at the penalty trial that it could not be governed by considerations of sympathy:

1. The feelings of sympathy, pity and mercy which are felt by decent persons everywhere are properly considered as a mitigating factor at the penalty phase of a capital murder trial, and an instruction that the jury is not to be bound by feelings of sympathy constitutes error, and plain error at that.

Exhibits H and N to Return of Writ.

On September 19, 1990, the Court of Appeals for Hamilton County issued a Decision affirming Petitioner Combs' convictions for aggravated murder and the death sentence. That court considered the First, Third, Fourth, Fifth, Eighth, Ninth, Twelfth, Thirteenth, Fourteenth, and Fifteenth Assignments of Error, as set forth above, on their merits and concluded that each was without merit. The court considered the Sixth and Tenth Assignments of Error pursuant to a plain error analysis, inasmuch as the asserted errors had not been subjects of objections at trial, and concluded that the trial court did not commit plain error. The Ohio appellate court concluded that the Sixteenth Assignment of Error had been waived. Finally, that court overruled the Second, Seventh, and Eleventh Assignments of Error, pursuant to each of which Petitioner Combs asserted ineffectiveness of trial counsel, on the ground that none of the claims of error that formed the basis of the ineffectiveness claims was found to be meritorious.

Petitioner Combs appealed the decision of the Hamilton County Court of Appeals to the Ohio Supreme Court. There, Petitioner asserted the following 15 propositions of law:

> Proposition of Law Number 1. The fact that a defendant in a capital criminal case advises police to talk to his lawyer may not be considered by a jury for any purpose, and an instruction in a capital case that the jury may consider such a statement as evidence of the essential elements of purpose and/or prior calculation and design is gross constitutional error in violation of rights of the accused under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Art. I Secs. 9, 10 and 16 of the Ohio Constitution and requires reversal of the conviction and resulting death sentence;
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> Proposition of Law Number 2. Any egregious error in the penalty phase of a death penalty proceeding, including prosecutorial misconduct, will be cause to vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to R.C. 2929.06;
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> Proposition of Law Number 3. The Fourteenth Amendment to the Constitution of the United States, and the Ohio Constitution, Art. I Secs. 9, 10 and 16, guarantee to every person charged with a capital offense the right to have his jury sentencing verdict made after consideration only of lawful aggravating circumstances, and uninfluenced by improperly admitted and argued victim impact evidence, and improper appeals to passion and prejudice, and no death sentence may

be affirmed unless the prosecution proves beyond a reasonable doubt that penalty trial error did not contribute to the death verdict;

Proposition of Law Number 4. It is the defendant in a capital case who has the right to present and argue the mitigating factors. If he does not do so, no comment on any factors not raised by him is permissible; the better practice is for the trial court not to refer in instructions to statutory mitigating factors not raised by the defendant;

Proposition of Law Number 5. Three-year sentences for possession of a firearm during the commission of felonies must be served prior to the serving of the sentence for the underlying felonies, and where a defendant is sentenced to death, and to two consecutive three year terms of imprisonment for the use or carrying of a firearm during the commission of the principal offenses, the two three year firearm sentences must be served prior to execution of the death sentence, and it is error to set a date for execution of the death sentence prior to the expiration of the six years imposed on the firearm specifications;

Proposition of Law Number 6. One on trial for his life is entitled to meaningful consideration of relevant mitigating factors, and where the trial court rejects or improperly weighs such factors because they do not constitute a defense to the crime (which would render the accused not guilty), then that right has been denied, to his prejudice;

Proposition of Law Number 7. The feelings of sympathy, pity and mercy which are felt by decent persons everywhere are properly considered as a

mitigating factor at the penalty phase of a capital murder trial, and an instruction that the jury is not to be bound by feelings of sympathy constitutes plain error;

Proposition of Law Number 8. Properly authenticated hospital records of the results of blood tests which are administered for the purpose of diagnosis or treatment are admissible, and where the results of such tests support the intoxication defense of a capital defendant, the refusal of the trial court to admit such test results is grossly and prejudicially erroneous, contrary to the rules of evidence, and a violation of due process under both the Ohio and federal Constitutions;

Proposition of Law Number 9. The admission of an involuntary confession is error, and in the absence of a defense motion to suppress that confession, it is plain error, requiring reversal of a resulting conviction;

Proposition of Law Number 10. A death sentence recommended by a jury from service on which one or more veniremen were excused because of their views concerning capital punishment cannot stand unless it affirmatively appears on the record that each such venireman excused for cause unequivocally indicates that his scruples against capital punishment will automatically prevent him from recommending the death penalty and/or that such views will render him unable to return a verdict of guilty no matter what the evidence, and that he is prevented by his scruples from following the instructions of the court and considering fairly the imposition of the death sentence;

Proposition of Law Number 11. The failure of defense counsel to object to an instruction of the trial court which advises the jury that the assertion of constitutional rights may be considered evidence of the existence of essential elements of the offense, to prosecutorial misconduct in final argument at the penalty phase of a capital prosecution, and to challenge by motion or otherwise the admission of a damaging statement by the accused, constitutes the denial of the right to the effective assistance of counsel secured to the accused by the Ohio and United States Constitutions;

Proposition of Law Number 12. The Ohio death penalty statutes are unconstitutional, violating the Eighth Amendment proscription of cruel and unusual punishments, the Fourteenth Amendment guarantees to due process of law and to the equal protection of the law, and also violating the concomitant provisions of the Ohio Constitution:

(A) The death penalty is so totally without penological justification that it results in the gratuitous infliction of suffering, and consequently, there is no rational state interest served by the ultimate sanction;

(B) Both locally, statewide and nationally, the death penalty is inflicted disproportionately upon those who kill whites as opposed to those who kill blacks, and even within Hamilton County, the death penalty is selectively imposed, rendering the penalty as applied in Hamilton County arbitrary and capricious on the one hand, and the

product of racial discrimination on the other;

(C) The use of the same operative fact to first elevate what would be "ordinary" murder to aggravated murder, and then to capital, death-eligible aggravated murder permits the state (1) to obtain a death sentence upon less proof in a felony murder case than in a case involving prior calculation and design, although both crimes are ostensibly equally culpable under the Revised Code, and (2) fails to narrow the capital class to those murderers for whom the death penalty is constitutionally appropriate;

(D) The requirement that a jury must recommend death upon proof beyond a reasonable doubt that the aggravating circumstances outweigh only to the slightest degree the mitigating circumstances renders the Ohio capital statutes quasi-mandatory and permits the execution of an offender even though the mitigating evidence falls just short of equipoise with the aggravating factors, with the result that the risk of putting someone to death when it is practically as likely as not that he deserves to live renders the Ohio capital process arbitrary and capricious, and, in the absence of a requirement that, before death may be imposed, aggravating factors must substantially outweigh mitigating factors, unconstitutional;

(E) The Ohio capital statutes are constitutionally infirm in that they do not permit the extension of mercy by the jury even though aggravating factors may only slightly outweigh mitigating factors;

(F) The provisions of Crim. R. 11(C)(3) permitting a trial court to dismiss specifications upon a guilty plea only under the nebulous and undefined concept "in the interests of justice"(1) needlessly encourages guilty pleas and the concomitant waiver of the right to jury, to compulsory process and to confrontation and (2) reintroduces the possibility that the death penalty will be imposed arbitrarily and capriciously;

(G) The Ohio capital sentencing scheme is unconstitutional because it provides no standards for sentencing or review at several significant stages of the process and consequently death sentences are imposed, and reviewed, without sufficient statutory guidance to juries, trial courts and reviewing courts to prevent the unconstitutional arbitrary and capricious infliction of the death penalty;

Proposition of Law Number 13. Where one is sentenced to death for aggravated murder, and no less than ten other defendants in the same county were capitally eligible, having been found guilty of aggravated murder during the commission of aggravated robbery, but none of those ten were capitally prosecuted, much less sentenced, then the death sentence for murder of the accused must be

vacated and set aside, as it is disproportionately severe;

Proposition of Law Number 14. An appellate court, in considering whether the death sentence meted to an individual appellant is disproportionately severe and appropriate, is required to consider for purposes of comparison, not only those cases where the death sentence was sought, but those cases where the defendant was death eligible, whether or not the death sentence was sought or imposed in such other cases;

Proposition of Law Number 15. Where, within a given county, those who are sentenced to death are most frequently convicted of the aggravated murder of white people, and those who escape the ultimate sanction are most frequently convicted of the aggravated murder of black people, the equal protection clause of the Fourteenth Amendment has been violated.

Exhibit S to Return of Writ.

On December 18, 1991, the Ohio Supreme Court affirmed the Decision of the Hamilton County Court of Appeals. Petitioner's Proposition of Law Number 1 was based upon Petitioner's instruction to Officer Ventre to "talk to . . . my lawyer" and the trial court's instruction to the jury that it could not consider that statement as evidence of guilt but that it was entitled to consider the statement as evidence of purpose of prior calculation and design. The Ohio Supreme Court analyzed the issues as follows:

Since Combs objected neither to the evidence nor to the trial judge's *sua sponte* instruction, the issue

must be analyzed on the basis of plain error. *State v. Long*, (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804; *State v. Wade* (1978), 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244.

Courts disapprove of penalties imposed for exercising the right to remain silent and to consult an attorney. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, prohibits comments by prosecutors seeking to premise guilt findings on a defendant's failure to testify. *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91, condemned the use of post-arrest silence to impeach a defendant's trial testimony. *Wainwright v. Greenfield* (1986), 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623, and *State v. Rogers* (1987), 32 Ohio St.3d 70, 512 N.E.2d 581, reversed convictions when defendants' pretrial exercise of rights of silence and to consult attorneys was used to refute insanity pleas.

The state argues that this principle only applies when *Miranda* warnings promise no adverse consequences from silence, and here no *Miranda* warnings were given. *See Jenkins v. Anderson* (1980), 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86; *Fletcher v. Weir* (1982), 455 U.S. 603, 606, 102 S.Ct. 1309, 1311-12, 71 L.Ed.2d 490, 494.

However, at the point when Combs was placed in the ambulance, we find that Combs was in custody and had a right to remain silent, consult a lawyer, and receive a *Miranda* warning. When he arrived at the scene, Officer Ventre personally took the shotgun from Combs; there were two women dead from shotgun blasts in the adjacent car; and Ventre had been at the scene for some ten to

fifteen minutes. Ventre's questioning, without a *Miranda* warning, violated those rights. Using Combs' comment, "talk to * * * [my] lawyer," in evidence at trial also violated his rights as viewed by *Griffin v. California*, *supra*.

Additionally, the "talk to my lawyer" evidence does not relate to or tend to prove prior calculation and design or purposefulness. Combs' comment simply meant that he was exercising his right to counsel and nothing more. Even if this remark was initially admissible, Evid.R. 401 and 403 would otherwise invite exclusion from evidence. No justification is apparent for the instruction that the evidence related to either purposefulness or prior calculation and design. Thus, we conclude the trial court erred in allowing this remark into evidence and instructing the jury to consider the remark in relation to purposefulness and prior calculation and design.

Nonetheless, neither the evidence nor the instruction constituted plain error. The evidence did not cause a miscarriage of justice, and neither the evidence nor the instruction produced a different result in the case. Since Combs' remark does not tend to prove either prior calculation and design or purposefulness, the jury could not have relied upon it to make those findings.

Other compelling evidence established purposefulness and prior calculation and design. Combs spent a considerable part of the afternoon of the murders searching for a shotgun. He asked two people for a shotgun, and eventually drove over eighty miles before returning to Cincinnati with a shotgun. The evidence indicates he stole

> the shotgun he used. After he drove back to Cincinnati, he confronted Joan and Peggy and initiated a car chase over several blocks, eventually cornering them at the Holiday Park Tower office building. He deliberately knocked out a window in their car and fired a shotgun into each woman's head at close range. Those facts alone establish both purposefulness and prior calculation and design. Thus, Combs has not shown plain error.

State v. Combs, 62 Ohio St.3d 278, 281-82 (1991).

Petitioner's Proposition of Law Number 2 to the Ohio Supreme Court was based upon the conduct of the prosecutor at sentencing. Petitioner contended that the prosecutor impermissibly referred to the victims' mental anguish and suffering, thereby converting the facts of the offense into a nonstatutory aggravating circumstance. The court ruled as follows:

> Combs did not object at trial, and "[a] claim of error in a criminal case can not be predicated upon the improper remarks of counsel during his argument at trial, which were not objected to, unless such remarks serve to deny the defendant a fair trial." *State v. Wade, supra*, 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244, paragraph one of the syllabus. Accord *Scott v. State* (1923), 107 Ohio St. 475, 141 N.E. 19, at paragraph two of the syllabus; Crim.R. 52(b).
>
> In his remarks, the prosecutor speculated at length about what Joan and Peggy thought as Combs confronted them, chased them in his car, and shot them. The following illustrates:

"* * * Can you imagine the terror of that? A gun right to your head, was she [Joan] thinking of her husband, who was going to take care of him? Was she thinking about her childhood? Was she thinking about her daughter take me but spare Peggy? That's the aggravating circumstance, what she went through. Or maybe she started to pray, we don't know. He won't tell us. * * * What went through her [Peggy's] mind, what was she thinking? Was she thinking of little Joey, who's going to take care of him, grandma is gone, I'm going to be gone, who's going to raise my little boy. And then comes the pull of that second trigger, and she's gone. That's the aggravating circumstance. * * * What weighs more, these two totally good lives or the defendant's life in the fast lane? * * *"

After reading his entire argument, we conclude that the prosecutor did err. The prosecutor did improperly suggest that how the victims were killed and the suffering and mental anguish the victims endured was an aggravating circumstance. Improperly injecting nonstatutory aggravating circumstances is error. *See State v. Davis* (1988), 38 Ohio St.3d 361, 367, 528 N.E.2d 925, 931. By continually referring to what the victims were thinking, the prosecutor engaged in gross speculation. However, the mention of the victims' personal situations and their relatives did not violate the Constitution. *Payne v. Tennessee* (1991), 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 270, overruling *Booth v. Maryland* (1987), 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989), 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876. Moreover, the prosecutor could legitimately refer to the nature and circumstances of the offense, both to refute any

> suggestion that they were mitigating and to explain why the specified aggravating circumstance, a course of conduct to kill two or more persons, outweighed mitigating factors. *See State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus; *State v. Lott* (1990), 51 Ohio St.3d 160, 171, 555 N.E.2d 293, 305.
>
> Although error, the prosecutor's sentencing comments did not rise to the level of plain error. The prosecutor's argument made no crucial difference, and Combs received a fair trial. No miscarriage of justice resulted from a death sentence, given the aggravating circumstance and the lack of any significant mitigating factors. Moreover, our independent reassessment of the sentencing evidence will cure the effect of this error. *See State v. Landrum* (1990), 53 Ohio St.3d 107, 124, 559 N.E.2d 710, 729; *State v. Lott, supra*, 51 Ohio St.3d at 170, 555 N.E.2d at 304.

State v. Combs 62 Ohio St.3d at 282-83.

Pursuant to his Proposition of Law Number 3 to the Ohio Supreme Court, Petitioner Combs argued that the Ohio Supreme Court could not properly reassess the death penalty when the jury's deliberations were tainted by prosecutorial misconduct, injection of nonstatutory aggravating circumstances, and other error. The court ruled as follows:

> In effect, Combs challenges *Clemons v. Mississippi* (1990), 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725, and asks that this court not implement that decision in Ohio.

> We have already rejected Combs' arguments and recognized that appellate reweighing can correct errors in sentencing. "Indeed, it is within the province of this court to conduct its own careful appellate reweighing of aggravating circumstances against mitigating factors to produce a 'measured consistent application' of the death penalty which would be in no way unfair to the defendant. *Clemons v. Mississippi, supra.*" *State v. Lott, supra*, 51 Ohio St.3d at 170, 555 N.E.2d at 729. R.C. 2929.05 mandates such an independent reweighing in both the court of appeals and this court. Accordingly, Combs' proposition of law No. 3 lacks merit.

State v. Combs, 62 Ohio St.3d at 286.

For his Proposition of Law Number 4 to the Ohio State Supreme Court, Petitioner argued that the trial court committed prejudicial error by instructing the jury on all statutory mitigating factors, including those not raised by defense counsel. Petitioner also contended that the prosecutor's arguments converted those statutory factors into non-statutory aggravating circumstances. The Ohio Supreme Court addressed the proposition as follows:

> In *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, we condemned references to statutory mitigating factors not raised by the evidence; however, this error does not require reversal. Combs objected neither to the instruction nor to the prosecutor's argument. In fact, defense counsel proposed an instruction listing all statutory factors; hence Combs induced any instructional deficiency that did occur. A party cannot complain about induced error. *Center*

> *Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 31 OBR 587, 511 N.E.2d 106.
>
> Here, no miscarriage of justice, plain error, or material prejudice resulted from references to nonapplicable mitigating factors. The trial court stated twice that some mitigating factors may not be relevant and followed the neutral, statutory words in listing the factors. The prosecutor did argue that none of the statutory mitigating factors applied and did give reasons. However, the prosecutor fairly argued the case and did not try to create nonstatutory aggravating circumstances. *See State v. Roe* (1989), 41 Ohio St.3d 18, 26, 535 N.E.2d 1351, 1361; *State v. DePew, supra*, 38 Ohio St.3d at 289-90, 528 N.E.2d at 557-558.

State v. Combs, 62 Ohio St.3d at 286-87.

The Supreme Court of Ohio also rejected Petitioner Combs' Proposition of Law Number 5. That proposition and the court's analysis with respect to it are not relevant to this action.

For his Proposition of Law Number 6 to the Ohio Supreme Court, Petitioner argued that the trial court failed to adequately weigh his intoxication at the time of the offenses as a significant "other factor" in mitigation. Petitioner also objected to the trial court's reference to the nature and circumstances of the offense. The court analyzed the issues related to that proposition as follows:

> The trial judge did not err in considering the asserted mitigating factor of intoxication. Instead, the trial judge simply determined that "defendant was responsive and not under the influence of drugs or alcohol at the time." The assessment of

> and weight to be given to mitigating evidence are matters for the trial court's determination. "* * * The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus.
>
> The trial judge's reference to the nature and circumstances of the offense was permissible. That reference explained why the evidence "permitted the jury to find that the aggravating circumstances outweighed the mitigating factors." A trial court or three-judge panel "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." *State v. Stumpf, supra*, 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus. Moreover, the trial court's opinion referred to only one aggravating circumstance, the charged course of conduct. Additionally, our independent sentence reassessment will cure any deficiency in the trial court's sentencing decision. *State v. Landrum, supra*, 53 Ohio St.3d 107, 559 N.E.2d 710; *State v. Lott, supra*, 51 Ohio St.3d 160, 555 N.E.2d 293. Thus Combs' claim of error lacks merit.

State v. Combs, 62 Ohio St.3d at 288.

In Proposition of Law Number 7 before the Ohio Supreme Court, Petitioner argued that the trial court's instruction to the jury concerning sympathy was plain error. The court instructed the jury as follows: "Remember, you must not be influenced in your deliberations by any consideration of sympathy or prejudice." The court ruled as follows:

> Since Combs did not object at trial nor raise the issue before the court of appeals, waiver applies. That instruction fails to qualify as plain error because the outcome of the trial was not affected. *State v. Long, supra*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804; *State v. Williams, supra*, 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364.
>
> Moreover, considered as a whole, the instructions adequately informed the jury of its responsibility to consider all the defense's mitigating evidence. *See California v. Brown* (1987), 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934, 942 (O'Connor, J., concurring). An instruction to exclude bias, sympathy or prejudice ensures that sentencing is based on reviewable guidelines, not a juror's personal bias or sympathy. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph three of the syllabus; *State v. Steffen, supra*, 31 Ohio St.3d at 125, 31 OBR at 285, 509 N.E.2d at 396. Requiring that capital sentencing be based on sympathy that jurors feel for an accused would be a new constitutional rule applying the Eighth Amendment. *Saffle v. Parks* (1990), 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415.

State v. Combs, 62 Ohio St.3d at 288-89.

For his Proposition of Law Number 8 to the Ohio Supreme Court, Petitioner Combs argued that the trial court erroneously declined to admit hospital records reflecting the results of a blood-alcohol test apparently administered to Petitioner while he was hospitalized following the offenses. The Ohio Supreme Court addressed the issues raised by that proposition as follows:

Combs correctly points out that any information about his blood-alcohol level on the date of the offense was relevant in both the guilt and punishment phases. *State v. Sowell* (1988), 39 Ohio St.3d 322, 324, 530 N.E.2d 1294, 1299; *see Bell v. Ohio* (1978), 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010.

However, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. Even relevant evidence may be excluded, under Evid.R. 403(A), if its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

Extreme uncertainty surrounded this particular report. The only date reflected in the proffered report was January 21, 1988, which was six months after Combs' hospital admission. Combs proffered no evidence as to when or why the test was given, who gave it, or under what circumstances it was given. Thus, the test was not admissible under the hearsay exception for business records. Combs did not establish that the report was made "at or near the time" of the event. Evid.R. 803(6).

Additionally, Combs proffered no explanation as to what the test results meant. As the court of appeals noted, "[t]his report reflected, without interpretation, raw data that would, by itself, have been unintelligible to the ordinary layperson." The test results could easily have been misinterpreted. Under these circumstances, the trial judge did not

> err in rejecting the report even though the parties agreed it was a hospital record.
>
> Moreover, any error was harmless. Combs presented extensive evidence concerning his drinking prior to the offenses, and the prosecutor conceded that point. Thus, information about his blood-alcohol test was cumulative. Furthermore, our independent sentence reassessment will cure any error to the extent that it might affect the sentences. *See State v. Landrum, supra*, 53 Ohio St.3d 107 at 124, 559 N.E.2d 710 at 729; *State v. Lott, supra*, 51 Ohio St.3d 160 at 170, 555 N.E.2d 293 at 304.

State v. Combs, 62 Ohio St.3d at 284.

Petitioner Combs also challenged, pursuant to his Proposition of Law Number 9, the admission of his remarks to nurse Leigh Ann Wright concerning the victims of his offenses. Regarding that proposition, the Ohio Supreme Court ruled as follows:

> Combs argues involuntariness based on alcohol, the surgery, and the effects of drugs he was given before and after surgery.
>
> However, Combs cannot benefit from the rule that excludes involuntary confessions. In *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, the Supreme Court refused to recognize "the right of a criminal defendant to confess to his crime only when totally rational and properly motivated * * *." Instead, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning

> of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly, supra*, at 166, 167, 107 S.Ct. at 521, 522, 93 L.Ed.2d at 484.
>
> In this case, Combs presented no evidence of coercive police activity or police questioning. Wright simply responded to a question that Combs asked, and Combs' remarks cannot be excluded as involuntary under the Fourteenth Amendment, whatever his mental state at the time. *Colorado v. Connelly, supra.*
>
> Even if Combs' statements were found inadmissible, reversal would not be required. Combs did not object; hence he waived all but plain error, and Combs' convictions did not rest on this confession. Combs conceded at trial that he had shot the two women, and two witnesses testified they saw him do so. Under the circumstances, the claim of plain error lacks any merit.

State v. Combs, 62 Ohio St.3d at 284-85.

The Ohio Supreme Court also rejected Petitioner's Proposition of Law Number 10, which was based upon the allegedly improper exclusion of a juror for expressing scruples concerning the death penalty. The court ruled as follows:

> The test for excluding prospective jurors, based on their personal views on the death penalty, "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the

> syllabus, following *Wainwright v. Witt* (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452.
>
> Combs complains that [juror] Hagemann's answers did not establish such impairment. However, Combs did not object specifically to her exclusion, nor did he seek to question her further or complain about the questions asked. Hagemann did not elaborate on her views. Under the circumstances, ambiguities can be resolved in the state's favor, and reversal is not required. *Wainwright v. Witt, supra*, 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851-52. "* * * '[D]eference must be paid to the trial judge who sees and hears the juror.' *Witt, supra*, at 426 [105 S.Ct. at 853, 83 L.Ed.2d at 853]. We will not overrule his decision absent an abuse of discretion. *State v. Wilson* (1972), 29 Ohio St.2d 203 [58 O.O.2d 409, 280 N.E.2d 915] * * *." *State v. Tyler* (1990), 50 Ohio St.3d 24, 30, 553 N.E.2d 576, 586.

State v. Combs, 62 Ohio St.3d at 285-86.

Pursuant to his Proposition of Law Number 11, Petitioner argued that his trial counsel was so ineffective that Petitioner was denied his constitutional right to counsel. The Ohio Supreme Court addressed that proposition as follows:

> Reversal of a conviction or sentence based upon ineffective assistance requires meeting the two-prong standard of *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *Strickland* requires: (a) deficient performance, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (b) prejudice, "error * * *

so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. As to performance, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693, 104 S.Ct. 2067, 80 L.Ed.2d at 697. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. *See, also, State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154; *State v. Hester* (1976), 45 Ohio St.2d 71, 74 O.O.2d 156, 341 N.E.2d 304.

Combs first argues ineffectiveness because his counsel failed to object to his statement to the police, "talk to * * * [my] lawyer," and the jury considered that statement on the issues of intention and prior calculation and design. However, the Constitution does not guarantee an error-free trial. "[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac* (1982), 456 U.S. 107, 134, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783, 804.

Even if counsel performed deficiently, Combs was not prejudiced by the evidence or the instruction. Combs' identity as the killer was not an issue, and

the evidence of purposefulness and prior calculation and design was otherwise compelling. As discussed in Part I, no reasonable probability exists that the result of the trial would have been different because of counsel's failure to object. *See Strickland v. Washington, supra*, 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 696; *State v. Bradley, supra*.

Similar reasoning applies to defense counsel's failure to object to the prosecutor's sentencing argument. Combs argues that the prosecutor erred in speculating on what the two victims were thinking in the moments before their death and by referring to the victims' families. However, the speculative nature of the prosecutor's remarks was apparent, and the references to families were brief. Any deficiency in counsel's performance did not alter the trial result given the aggravating circumstance and the lack of significant mitigating factors. *Strickland v. Washington, supra; State v. Bradley, supra*. Additionally, our independent reassessment of the death sentence will rectify any error that occurred. *State v. Landrum, supra*, 53 Ohio St.3d at 124, 559 N.E.2d at 729,: *State v.Lott, supra*, 51 Ohio St.3d at 170, 555 N.E.2d at 304.

Combs further argues that his counsel's failure to move to suppress his confession constituted ineffective assistance. However, defense counsel had no basis on which to suppress this statement. *Colorado v. Connelly, supra*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473. Moreover, the admission of the statement made no difference at trial since Combs' identity as the killer was not an issue.

State v. Combs, 62 Ohio St.3d at 289-90.

For his Proposition of Law Number 12 before the Ohio Supreme Court, Petitioner argued that the Ohio death penalty statute is unconstitutional on a number of grounds. The Ohio Supreme Court ruled as follows:

> Combs failed to challenge the statute on many of these issues at trial. By failing to do so, he waived any constitutional objection on those grounds. *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, syllabus; *State v. Greer* (1988), 39 Ohio St.3d 236, 244, 530 N.E.2d 382, 394. Moreover, we have consistently rejected all of Combs' arguments. *See State v. Beuke* (1988), 38 Ohio St.3d 122, 132, 529 N.E.2d 913, 923; *State v. Sowell, supra*, 39 Ohio St.3d at 336, 530 N.E.2d at 1309.

State v. Combs, 62 Ohio St.3d at 291.

Pursuant to his Propositions of Law Numbers 13 and 14, Petitioner Combs attacked Ohio's proportionality review. The Ohio Supreme Court ruled as follows:

> Combs' arguments lack merit. Proportionality review is not constitutionally required. *Pulley v. Harris* (1984), 465 U.S. 37, 50, 104 S.Ct. 871, 879, 79 L.Ed.2d 29, 40; *State v. Jenkins, supra*, at 176, 15 OBR at 321, 473 N.E.2d at 278. The proportionality review mandated in R.C. 2929.05 "is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *State v. Steffen, supra*, paragraph one of the syllabus.

State v. Combs, 62 Ohio St.3d at 289.

Petitioner's Proposition of Law Number 15 before the Ohio Supreme Court was an equal protection attack upon the imposition of the death penalty in his case. The court addressed Petitioner's arguments as follows:

> In proposition of law No. 15, Combs urges an equal protection argument that both the United States Supreme Court and we have rejected. *See McCleskey v. Kemp* (1987), 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262; *State v. Zuern* (1987), 32 Ohio St.3d 56, 512 N.E.2d 585, syllabus.

State v. Combs, 62 Ohio St.3d at 291.

Petitioner Combs moved for a rehearing. The Ohio Supreme Court denied that motion on January 22, 1992. *See State v. Combs*, 62 Ohio St.3d 1503 (1992). Petitioner's petition for a writ of *certiorari* was denied by the United States Supreme Court on June 8, 1992. *See Combs v. Ohio*, 504 U.S. 977 (1992).

Petitioner Combs then filed a petition for post-conviction relief in the Court of Common Pleas for Hamilton County on April 26, 1993. On May 8, 1993, he filed an amended petition in that court. There, he raised 59 claims for relief:

(1) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court erred in denying Petitioner's motion for change of venue;

(2) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court incorrectly instructed the jury that it was permitted to consider as evidence of

purpose and prior calculation and design Petitioner's statement to police that they should talk to his lawyer;

(3) Petitioner Combs' convictions and sentences are void and/or voidable because his trial attorneys failed to effectively represent him during voir dire of prospective jurors;

(4) Petitioner Combs' convictions and sentences are void and/or voidable because Petitioner was denied the effective assistance of trial counsel by their failure to object to the error contained in the second claim for relief;

(5) Petitioner Combs' convictions and sentences are void and/or voidable because during voir dire the trial court improperly limited defense counsel's questions to potential jurors;

(6) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court set his execution to occur before expiration of his two consecutive three-year sentences for the firearm specifications;

(7) Petitioner Combs' convictions and sentences are void and/or voidable because prospective jurors were told that a death penalty was mandatory if the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt;

(8) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court erroneously instructed the jury,

during the mitigation phase of trial, on every statutory mitigator, whether or not it applied to the case;

(9) Petitioner Combs' convictions and sentences are void and/or voidable because the prosecutor sought and received commitments from jurors in voir dire to sentence Petitioner to death in this case;

(10) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court allowed the prosecutor, during penalty phase closing, to commit many acts of misconduct;

(11) Petitioner Combs' convictions and sentences are void and/or voidable because Petitioner Combs was deprived of his right to the effective assistance of counsel during the guilt/innocence phase of his case;

(12) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court allowed the prosecutor, during penalty phase, to cite the nature and circumstances of the offense as an aggravator;

(13) Petitioner Combs' convictions and sentences are void and/or voidable because trial counsel failed to request and the trial court failed to appoint, a drug and alcohol expert in Petitioner's case;

(14) Petitioner Combs' convictions and sentences are void and/or voidable because the

appeals courts determined whether Mr. Combs' jury, absent the errors at trial, would still have imposed death. This should only be done when the state establishes beyond a reasonable doubt that the errors did not contribute to the sentence;

(15) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court allowed inadmissible and prejudicial testimony during the state's cross-examination of Dr. Roger Fisher;

(16) Petitioner Combs' convictions and sentences are void and/or voidable because he was denied effective assistance by his counsel's failure to object to the prosecutor's improper penalty phase closing arguments;

(17) Petitioner Combs' convictions and sentences are void and/or voidable because jurors during voir dire were informed that they had to convict Petitioner of a death penalty specification in order to reach the sentencing phase;

(18) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court, in its opinion, conducted an unconstitutionally improper weighing of aggravators and mitigators;

(19) Petitioner Combs' convictions and sentences are void and/or voidable because during voir dire, jurors were repeatedly told incorrect statements of the law;

(20) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court improperly excluded evidence of the blood tests given to Petitioner during his hospital stay following the offense in question;

(21) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court gave an improper instruction on reasonable doubt in both the guilt/innocence and penalty phases of Petitioner's trial;

(22) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court improperly admitted an involuntary statement of Petitioner that the victims were "bitches" whose deaths "served the Goddamned whores right;"

(23) Petitioner Combs' convictions and sentences are void and/or voidable because at the close of the guilt phase, the trial court instructed the jury that Petitioner had the burden of proving the defense of intoxication by a preponderance of the evidence;

(24) Petitioner Combs' convictions and sentences are void and/or voidable because his trial counsel failed to file a motion to suppress his voluntary statement and failed to object to the admission of the statement at trial;

(25) Petitioner Combs' convictions and sentences are void and/or voidable because inaccurate testimony was presented at Petitioner's trial;

(26) Petitioner Combs' convictions and sentences are void and/or voidable because his death sentence is disproportionate to the sentences of others in Hamilton County;

(27) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court gave an erroneous instruction on causation in the guilt/innocence phase jury instructions;

(28) Petitioner Combs' convictions and sentences are void and/or voidable because the Ohio death penalty scheme is unconstitutional on its face in violation of the United States Constitution and the Ohio Constitution;

(29) Petitioner Combs' convictions and sentences are void and/or voidable because defense counsel did not request, and the trial court did not appoint, a social worker to assist counsel in identifying, interviewing, and preparing witnesses for the mitigation phase of trial;

(30) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court improperly excused for cause venire persons who had scruples about the death penalty;

(31) Petitioner Combs' convictions and sentences are void and/or voidable because Petitioner's trial counsel's performance did not meet the level of performance guaranteed by the Ohio and United States Constitutions;

(32) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court in mitigation improperly instructed the jury that it should not be influenced by considerations of sympathy;

(33) Petitioner Combs' convictions and sentences are void and/or voidable because Petitioner's trial counsel failed to request, and the trial court failed to appoint, an independent psychological expert in Petitioner's case;

(34) Petitioner Combs' convictions and sentences are void and/or voidable because Ohio's plain error standard, used to review those errors to which counsel did not object at trial, is unconstitutionally overstringent;

(35) Petitioner Combs' convictions and sentences are void and/or voidable because Petitioner Combs' death sentence is unreliable, inappropriate, and violates the Eighth and Fourteenth Amendments to the United States Constitution;

(36) Petitioner Combs' convictions and sentences are void and/or voidable because the appellate courts failed to consider the cumulative effect of the errors at trial;

(37) Petitioner Combs' convictions and sentences are void and/or voidable because the jurors did not understand the instructions of law given to them by the court;

(38) Petitioner Combs' convictions and sentences are void and/or voidable because his trial counsel failed to adequately voir dire prospective jurors on their attitudes toward the issues that would be important during the penalty phase;

(39) Petitioner Combs' convictions and sentences are void and/or voidable because the State of Ohio, on appeal, failed to establish beyond a reasonable doubt that any constitutional error that occurred during Petitioner Combs' trial did not contribute to the convictions and sentences of Petitioner Combs;

(40) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court did not give the jury instructions on the lesser included offense of voluntary manslaughter, nor would the court let defense counsel voir dire prospective jurors on this issue;

(41) Petitioner Combs' convictions and sentences are void and/or voidable because defense counsel failed to request a cultural expert to assist in preparing Petitioner's mitigation case;

(42) Petitioner Combs' convictions and sentences are void and/or voidable because his counsel were ineffective in failing to request a jury instruction on voluntary manslaughter;

(43) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court failed to adequately define the term "outweigh" in its sentencing instructions to the jury;

(44) Petitioner Combs' convictions and sentences are void and/or voidable because his trial counsel were ineffective for conceding that Dr. Fisher could not testify, at the trial phase, about Petitioner's statement that Joan Schoonover, one of the victims, had previously held a gun on him;

(45) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court gave an improper definition of "mitigating factors" during the penalty phase jury instructions;

(46) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court did not allow Dr. Fisher to testify about Petitioner's statement that Joan Schoonover, one of the victims, had previously pulled a gun on him;

(47) Petitioner Combs' convictions and sentences are void and/or voidable because the State failed to prove that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt in Petitioner Combs' case. Because there was

insufficient evidence to prove that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt, the death sentence imposed on Mr. Combs violated his rights of due process and against cruel and unusual punishment under the Eighth and Fourteenth Amendments, United States Constitution;

(48) Petitioner Combs' convictions and sentences are void and/or voidable because his trial counsel were ineffective for failing to request a jury instruction that clarified the distinction between the defense of intoxication and the element of prior calculation and design;

(49) Petitioner Combs' convictions and sentences are void and/or voidable because the constitutionally mandated appellate review was done from an incomplete record;

(50) Petitioner Combs' convictions and sentences are void and/or voidable because the prosecutors exercised their peremptory challenges against all jurors having scruples against the death penalty who had not been successfully challenged for cause: David A. Ange, Jr., Gracie Adkins, and Esther L. Grayson;

(51) Petitioner Combs' convictions and sentences are void and/or voidable because the Ohio death penalty is in violation of international laws and Article VI, United States Constitution;

(52) Petitioner Combs' convictions and sentences are void and/or voidable because of the prosecutorial misconduct that occurred throughout his trial;

(53) Petitioner Combs' convictions and sentences are void and/or voidable because the system used by the Hamilton County Prosecutor's office in seeking and securing capital convictions and death sentences is discriminatory;

(54) Petitioner Combs' convictions and sentences are void and/or voidable because of the prosecutor's misconduct in citing victim impact evidence during trial;

(55) Petitioner Combs' convictions and sentences are void and/or voidable because his trial counsel were ineffective in repeatedly conceding Petitioner's guilt;

(56) Petitioner Combs' convictions and sentences are void and/or voidable because his trial counsel were ineffective in failing to request a penalty phase jury instruction explaining the distinction between "excuse" and "mitigation;"

(57) Petitioner Combs' convictions and sentences are void and/or voidable because agents of the state interfered with his efforts to interview witnesses;

(58) Petitioner Combs' convictions and sentences are void and/or voidable because the trial court failed to vacate one of the two course

of conduct specifications before the sentencing hearing;

(59) Petitioner Combs' convictions and sentences are void and/or voidable because his trial counsel provided ineffective assistance in [failing to object to a laundry list of alleged errors].

The Court of Common Pleas issued its decision denying Petitioner's petition on May 20, 1993. Petitioner moved for relief from that decision. He argued that some of the transcripts necessary to the court's decision had not been transcribed prior to the issuance of the decision and that the court's decision was, accordingly, based upon a less than complete record. The Court of Common Pleas denied the motion for relief from judgment on June 15, 1993.

In its decision, the Court of Common Pleas concluded that the following claims for relief were barred by the doctrine of *res judicata*, inasmuch as Petitioner raised them or could have raised them at trial or on direct appeal: 1-10, portions of 11, 12-13, 15-30, portions of 31, 32-33, 37-38, 40, 42-48, portions of 49, 50-56, and 58-59. *See* Exhibit II to Return of Writ. The court concluded that the following claims for relief lacked merit or were not supported by evidence: portions of 11, 14, portions of 31, 35, and 41. *See Id.* Finally, the court concluded that it could not entertain the following claims for relief: 34, 36, 39, portions of 49, and 57. *See Id.*

Petitioner appealed to the Ohio First District Court of Appeals. There, Petitioner raised eight assignments of error:

First Assignment of Error. The trial court erred in denying Petitioner Combs an evidentiary hearing

in regard to his petition for post-conviction relief, thus violating his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16, and 20 of the Ohio Constitution;

Second Assignment of Error. The trial court erred in issuing inadequate findings of fact and conclusions of law in regard to Petitioner Combs' petition for post-conviction relief, thus violating his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 1,2, 9, 10, 16, and 20 of the Ohio Constitution;

Third Assignment of Error. The trial court erred in its application of the doctrine of res judicata to the claims for relief raised by Appellant, thus violating his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16, and 20 of the Ohio Constitution;

Fourth Assignment of Error. The trial court erred in failing to grant relief as to Appellant's eleventh and thirty-first claims for relief;

Fifth Assignment of Error. The trial court erred in failing to grant relief as to Appellant's thirteenth, thirty-third, and forty-first claims for relief;

Sixth Assignment of Error. The trial court erred in denying Appellant's first amended petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Ann. Section 2953.21 because each of the fifty-nine claims for relief set forth a constitutional claim upon which relief should have been granted;

Seventh Assignment of Error. This court erred in granting only in part Appellant's motion to file a brief in excess of thirty-five pages;

Eighth Assignment of Error. The trial court erred by adopting verbatim the prosecutor's unsolicited findings of fact, conclusions of law and order.

The Ohio Court of Appeals affirmed the Court of Common Pleas' judgment on August 24, 1994. Petitioner Combs then sought review by the Ohio Supreme Court. He asserted the following propositions of law:

Proposition of Law Number 1. When a death penalty is affirmed by denial of a petition for post-conviction relief, a post-conviction petitioner has an appeal as a matter of right to the Supreme Court of Ohio;

Proposition of Law Number 2. A trial court cannot deny an evidentiary hearing to a post-conviction petitioner when his petition is sufficient on its face to raise constitutional claims which depend on factual allegations that cannot be determined from the record;

Proposition of Law Number 3. A trial court cannot summarily dismiss a post-conviction petition based upon findings of facts and conclusions of law that are inadequate and/or erroneous;

Proposition of Law Number 4. The doctrine of res judicata cannot be applied to bar Appellant's claims for relief when those claims were supported by evidence dehors the record;

Proposition of Law Number 5. The convictions and sentences of a defendant must be reversed when he is denied the effective assistance of counsel at both the guilt and penalty phases of his capital trial;

Proposition of Law Number 6. The convictions and sentences of a capital defendant must be reversed when he is denied his right to expert assistance at trial;

Proposition of Law Number 7. A trial court cannot deny a petition for post-conviction relief filed pursuant to Ohio Rev. Code Ann. § 2953.21 (Anderson 1993) when each of the fifty-eight claims for relief set forth constitutional violations entitling the Appellant to relief;

Proposition of Law Number 8. A capital appellant is denied due process, equal protection, and effective assistance of counsel when page limitations are imposed upon the appellant in the filing of his merit brief;

Proposition of Law Number 9. Ohio R. Civ. P. 52 requires that findings of fact and conclusions of law be those made by the court. Findings and conclusions are improper and should be revised when they are gratuitously submitted by a party before the court has decided the case.

On February 1, 1995, the Ohio Supreme Court declined jurisdiction, without opinion. *State v. Combs*, 71 Ohio St.3d 1455 (1995). Petitioner moved for reconsideration, arguing that

> application of the doctrine of res judicata in a post-conviction action is improper when the claim for relief is supported by evidence dehors the record

> and is also raised in terms of ineffective assistance of counsel where the same counsel represented the defendant at trial and throughout direct appeal.

The Ohio Supreme Court denied Petitioner's motion for reconsideration on March 15, 1995. *State v. Combs*, 71 Ohio St.3d 1494 (1995).

In June of 1993, Petitioner had filed an application for delayed reconsideration in the First District Court of Appeals. Petitioner asserted that he was filing the application pursuant to *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

The Court of Appeals denied the application on February 22, 1994, ruling as follows:

> The within application raises a claim of ineffective assistance of appellate counsel and was brought pursuant to *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, and App.R. 26, which was amended on July 1, 1993. The application is denied because appellant has failed to show good cause for filing it more than ninety days after this Court's judgment was journalized, as required by App.R. 26(B)(2)(b).

Petitioner sought review by the Ohio Supreme Court. The Ohio Supreme Court affirmed the Court of Appeals' decision without opinion. Petitioner moved the Ohio Supreme Court for rehearing, arguing that he had been denied the procedure established in *State v. Murnahan, supra*. The Ohio Supreme Court denied the motion for rehearing, again without opinion, on August 24, 1994. On February 21, 1995, the United States Supreme Court denied Petitioner's petition for a writ of *certiorari*. *See Combs v. Ohio*, 513 U.S. 1167 (1995).

Petitioner filed his petition in this Court on August 30, 1995, and filed his corrected petition on September 1, 1995.

III. The Claims Presented and The Court's Analysis

A. The Claims Set Forth in the Petition

Petitioner asserts 53 claims for relief. The numbering of the claims is confusing and, in places, non-sequential, however, and Respondent has not adhered to Petitioner's enumeration of the claims. Accordingly, the Court will refer to the claims as the First through Fifty-third Claims for Relief. Set forth below are the 53 claims.

First Claim for Relief. **The trial court improperly limited defense counsel questions to potential jurors**. Petitioner Combs contends that the trial court violated Petitioner's Sixth and Fourteenth Amendment rights to a fair and impartial jury by prohibiting counsel from asking a juror the following question: "What do you think the best argument is in favor of the death penalty?" Transcript, p.71. On the same basis, Petitioner objects to the trial court's refusal to permit him to ask the following questions of the venire:

(A) What do you think is the best argument in favor of the death penalty?

(B) What do you think is the best argument against the death penalty?

(C) Do you believe that the death penalty deters or prevents others from committing the crime of murder?

Transcript, pp.74-75.

Second Claim for Relief. **The trial court improperly permitted jurors to be informed that conviction on a death penalty specification was necessary to reach sentencing.** Petitioner Combs contends that his constitutional rights were violated when the prosecutor informed a potential juror that

> this is a case that is referred to in Ohio as being bifurcated, that's a fancy name for two parts. The first part of the case deals with guilt or innocence, we may or may not get to the second phase. If we do get to the second phase under the appropriate circumstances then you will be asked to consider the imposition of the death penalty.

Transcript, pp.117-18. Petitioner notes that the prosecutor made similar remarks to other potential jurors. *See* Transcript, pp.175-76; 244-45; 322.

Third Claim for Relief. **The trial court erred by prohibiting voir dire on the offense of voluntary manslaughter.** Petitioner Combs contends that the trial court deprived him of his rights to a fair trial, a reliable death sentence, and due process by failing to permit the venire to be questioned about voluntary intoxication. Petitioner bases his contention upon the following statements of the trial court during voir dire:

> There has been some suggestion about a lesser included offense of voluntary manslaughter. While it might be a lesser included offense based upon what I heard of murder, based upon the intent I can't see where you are going on voluntary manslaughter, and how there is anything that is serious provocation to [sic] reasonably sufficient to incite the use of deadly force under the description of the facts of this case. I'd appreciate it if you wouldn't mention it.

* * *

> Certainly murder may be a lesser included offense in this case. I have yet to hear any fact which would suggest that voluntary manslaughter is a lesser included offense. Not on this prospective juror but earlier in the morning there was a mention that voluntary or involuntary manslaughter might be a lesser included offense. Obviously involuntary manslaughter couldn't possibly be a lesser included offense and I don't see how voluntary manslaughter could be and if that's the case then I'd request that when you question jurors about the lesser included offense you not refer to voluntary or involuntary manslaughter.

Transcript, pp.199-200. Petitioner contends that the trial court's instruction to counsel was error inasmuch as Petitioner's defense to the aggravated murder charges was that he was intoxicated when he shot Peggy and Joan Schoonover.

Fourth Claim for Relief. **The trial court improperly instructed the jury on the purposes for which it could consider Petitioner Combs' statement to the police.** Petitioner Combs contends that the trial court committed plain error when it gave the following instruction to the trial jury, *sua sponte,* after Officer Ventre testified:

> Members of the jury, I am going to give you a special instruction at this time based upon the testimony that you heard. [T]he defendant Ronald Dean Combs has a constitutional right not to speak to members of law enforcement without counsel and not to speak to them. You cannot draw any inferences for or against the defendant

> because he may have requested an attorney or made no further statements to Officer Ventre when he was on the stretcher as Officer Ventre testified to.
>
> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give this testimony depends upon your findings and the weight that you attribute to this testimony in this regard so please remember that.

Transcript, pp.1052-53.

Petitioner contends that the error was compounded when the prosecutor remarked as follows in his closing arguments to the jury:

> When questioned by Police Officer Ventre right at the time he was finally taken into the care of the paramedics, Officer Ventre told you that at one point in time he went over to the defendant in an effort to find out a little more about what was going on, get a name and some more facts and what did the defendant respond to him? Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated he doesn't know what's going on? Isn't that evidence that he realizes the gravity of the situation and at this time gave that particular comment or response to Officer Ventre.

Transcript, pp. 1254-55.

Fifth Claim for Relief. **The trial court improperly admitted an involuntary statement of the Petitioner as evidence of purpose and prior calculation and design.** Petitioner Combs further contends that the trial court erred by admitting

statements Petitioner made to Leigh Ann Wright, a hospital nurse. Specifically, Petitioner contends that the court erred by admitting his references to the victims of his offenses as "bitches" and "whores." Petitioner objects on the grounds that his statements were involuntary, in addition to being inflammatory.

Sixth Claim for Relief. **The trial court improperly excluded Dr. Fisher's testimony that a victim had previously pulled a gun on Petitioner.** Petitioner represents that Joan Schoonover once brandished a gun in his presence and told Petitioner that she did not want him around anymore. The trial court would not permit expert Dr. Fisher to testify about the incident and its bearing, if any, on Petitioner's psychological state. After Petitioner's counsel had already conceded that the question he had put to Dr. Fisher was objectionable, the court ruled as follows:

> Well, I just don't think you can pursue this area, what you are doing in essence is taking irrelevant material and allowing Dr. Fisher to testify for the defendant without the defendant taking the stand.

Transcript, p.1179.

Petitioner contends that the evidence that the trial court excluded was relevant to establish lack of purpose and prior calculation and design. Petitioner further contends that the evidence demonstrated provocation by Joan Schoonover, thus satisfying an element of voluntary manslaughter.

Seventh Claim for Relief. **The trial court improperly allowed inadmissible and prejudicial testimony from Dr. Fisher.** Petitioner Combs represents that he called Dr. Fisher as a witness to establish that Petitioner was intoxicated as a result of the ingestion of alcohol and drugs at the time he committed

the offenses. Petitioner contends that the trial court erred in the following interchange during the prosecution's cross-examination of Dr. Fisher:

> Q: Dr. Fisher, you have rendered an opinion that at the time, July 15th, the defendant was under the influence, is that correct?
>
> A: That's my opinion, yes.
>
> Q: You are not however saying that the acts he did on that particular day were not done purposely?
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> A: I certainly am not, no.
>
> Q: So he may have been under the influence or your opinion based on what you were told he was under the influence but at the same time he was acting intentionally and purposely when he acted as he did on July 15th; is that correct?
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> A: I certainly believe that he was, yes.

Transcript, p.1183.

Petitioner contends that, by admitting the testimony of Dr. Fisher, the trial court allowed the witness to usurp the province of the jury. Petitioner contends that the prosecutor compounded the error by

referring to Dr. Fisher's testimony in his closing argument. *See* Transcript, pp.1226-27, 1234, 1251.

Eighth Claim for Relief. **The trial court impermissibly shifted the burden of proof as to the intoxication issue.** Petitioner Combs contends that the following instruction, given by the trial court to the trial jury, was erroneous:

> Even if the defendant fails to prove intoxication by a preponderance of the evidence the State still must prove every element of the crime charged beyond a reasonable doubt before you can convict the defendant of aggravated murder. If you find by a preponderance or greater weight of all the evidence that by reason of intoxication the mind of the defendant was in such condition that either he was not capable of forming a purpose to kill Joan Schoonover or that he was not capable of acting with prior calculation and design, he is not guilty of aggravated murder as purpose is an essential element of the offense.

Transcript, p.1271. Petitioner also objects to the following instruction:

> The defendant maintains that as to the second count of the indictment he did not act purposely and he did not act with prior calculation and design because he was intoxicated or under the influence of drugs. To determine whether the defendant was influenced by the effect of alcohol and drugs to such an extent that his mind could not and did not form the purpose to kill Marguerite Peggy Schoonover or act with prior calculation and design, you will consider the facts and circumstances relating to this condition at the time in question.

> On the issue of burden of proof that issue [sic], that burden is upon the defendant to establish by a preponderance of the evidence or greater weight of the evidence that at the time in question he was so influenced by alcohol and drugs that he was incapable of forming a purpose to commit the offense and was incapable of killing Marguerite Peggy Schoonover with prior calculation and design.

Transcript, pp. 1277-78.

Petitioner contends that the instructions were constitutionally defective inasmuch as they shifted the burden to Petitioner to disprove an element of the prosecution's case. Petitioner also contends that the trial court erred by not instructing the jury to consider the intoxication evidence in determining whether the prosecution had proved the mental element of aggravated murder beyond a reasonable doubt.

Ninth Claim for Relief. **The trial court impermissibly instructed the jury on reasonable doubt**. Petitioner Combs contends that the trial court erred by instructing the jury according to the Ohio Revised Code's definition of "reasonable doubt." Section 2901.05 of the Ohio Revised Code ("O.R.C.") defines "reasonable doubt" as follows:

> Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

Petitioner contends that that instruction fails to satisfy "the principle that a death sentence must be based upon a greater certainty." Petition, p.15. Petitioner contends that the instruction requires less than the degree of certainty required by the Due Process Clause.

Tenth Claim for Relief. **The trial court improperly excluded evidence of blood tests.** Petitioner Combs contends that the trial court erred by excluding the results of a blood test taken during Petitioner's hospital stay after the commission of the offenses for which he was convicted. Petitioner recognizes that the court excluded the test results on the ground that they did not contain indicia of the date upon which the test was administered. Petitioner contends that "[q]uestions regarding who performed the tests and when they were performed go to weight, not admissibility." Petition, p.16.

Eleventh Claim for Relief. **The trial court erroneously instructed the jury on causation.** Petitioner Combs contends that O.R.C. §2903.01(B) requires that a jury find specific intent to cause the death of another before convicting a defendant of aggravated murder. Petitioner contends that the following instruction given by the trial court undermined the *mens rea* element of the offense:

> Causation is also an essential element of aggravated murder. The State charges that the acts of the defendant caused the death of Joan Schoonover. Cause is an act which in the natural and logical and continuous sequence directly produces the death of a person without which it would not have occurred. Cause occurs when the death is a natural and foreseeable result of the acts of the defendant. The test for foreseeability is not whether the defendant should have foreseen the death in its precise form, the test is whether in light of all the circumstances a reasonably prudent person would have anticipated that death was likely to result to anyone from the performance of the act or acts.
>
> A prudent man is the average or ordinary individual who exercises the same degree of care that all reasonable and diligent persons would exercise under the same or similar circumstances.

Transcript, pp.1272-73.

Twelfth Claim for Relief. **The trial court improperly classified and weighed aggravating and mitigating circumstances**. Petitioner Combs contends that the trial court erred by rejecting intoxication as a mitigating factor and by classifying the nature of the offenses as an aggravating factor. Petitioner contends that those actions on the part of the trial court violated rights guaranteed to him by the Eighth Amendment.

Specifically, Petitioner contends that the trial court erred by failing to give weight to his evidence of intoxication, inasmuch as *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), requires the sentencing court to include all relevant evidence in its considerations. Petitioner

contends that in rejecting the intoxication evidence, on the ground that it did not negate the intent to kill, the trial court ignored the fact that the intent to kill was a culpability phase issue and not relevant to sentencing.

Petitioner further contends that the trial court erred by considering the nature and circumstances of the offenses as aggravating circumstances. Petitioner contends that the nature and circumstances of an offense may only be considered for their mitigating value.

Thirteenth Claim for Relief. **The trial court improperly instructed the jury on inapplicable statutory mitigators.** Petitioner Combs contends that, during the mitigation phase of sentencing, the trial court erred by instructing the jury as to all of the statutory mitigating factors set forth in O.R.C. §2929.04(B)(1) to (B)(6). Petitioner based his case in mitigation upon only two of the six statutory factors: duress or strong provocation and lack of the substantial capacity to conform his conduct to the requirements of law due to a mental disease or defect. Petitioner also raised the nonstatutory mitigators of his relationship with Peggy Schoonover and their son, his alcohol and chemical dependency, the loss of his arm, his remorse, and his intoxication at the time of the offense.

Petitioner contends that by instructing the jury on all of the statutory mitigators, the trial court encouraged the jury to focus on the absence of evidence in support of four of them. He contends that the court created a new aggravator based upon the lack of evidence in support of certain mitigators.

Fourteenth Claim for Relief. **The trial court improperly defined "mitigating factors."** During the penalty phase of the trial, the court instructed the jury as follows:

> What are mitigating factors? The statute provides certain mitigating factors, some of which may not apply to this hearing. Mitigating factors are factors that while they do not justify or excuse the crime of aggravated murder, nevertheless may be considered by you as extenuating, lessening, weakening, excusing to some extent or reducing the degree of the defendant's blame. You are to weigh as mitigating factors as you may deem applicable in this case the nature and circumstances of the offense, the history, background and character of the defendant, and the following factors which are mentioned by way of illustration and not for the purpose of limiting your consideration.

Transcript, pp.1434-35.

Petitioner contends that the trial court's instruction was erroneous in that it suggested to the jury that a mitigating factor must excuse or reduce the defendant's blame in order to support a life sentence. Petitioner contends that the trial court's instruction denied Petitioner the benefit of mitigation evidence that did not rise to the level of an excuse:

Fifteenth Claim for Relief. **The trial court improperly defined "outweigh."** The trial court also instructed the jury as follows during the penalty phase:

> To outweigh means to weigh more than, to be more important than, in this regard it is the quality of the evidence that must be given consideration by you and the quality of the evidence may or may not be commensurate with the quantity of the evidence, that is the greater number of witnesses or exhibits presented.

Transcript, p.1429.

Petitioner Combs contends that the trial court's definition of "outweigh" was vague and did not suitably guide the jury's discretion. In essence, Petitioner contends that the trial court did not provide the jury with standards to guide its discretion.

Sixteenth Claim for Relief. **The trial court improperly instructed the jury on considerations of sympathy.** Petitioner Combs contends that, by instructing the jury during the penalty phase not to be swayed by feelings of sympathy, the trial was essentially telling the jury not to have mercy upon Petitioner. Petitioner contends that such an instruction undermines the principles of individualized sentencing recognized in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

Petitioner contends that the harm resulting from the trial court's erroneous instruction was compounded by the prosecutor's closing argument. The prosecutor argued as follows:

> Now there is no room for sympathy in this case and we could have paraded in witnesses to sit up here in this witness stand and cry but your job is not supposed to be based on sympathy, bias or prejudice on either side. I'm not going to tell you not to feel emotional. I feel emotion right now. Everyone in this room is feeling some kind of emotion. I can afford to feel emotion, you cannot. You have to set it aside. I can't tell you not to feel it, you are going to feel it, it is going to be there. You are going to go back and you are going to talk about this case and you are going to feel it but as a juror you have to put it aside, you can feel it later but you can't feel it when you go back into that jury room and you have to follow the law and when

> we talked to you in the voir dire examination at the beginning of the case we knew that was coming, you may or may not have and that day has arrived just like Mr. Stidham has said and you are going to have to wholly and calmly using your common sense in rationing through this case and *look at the facts without letting* any sympathy or bias interfere with it and I think you can do it.

Transcript, pp.1424-25.

Seventeenth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during voir dire of prospective jurors by waiving Petitioner's final two peremptory challenges.** Petitioner Combs contends that defense counsel failed to ensure that Petitioner was tried by a representative jury. Moreover, Petitioner contends that by waiving the final peremptory challenges counsel waived venue arguments to Petitioner's prejudice. Petitioner does not elaborate upon the manner in which he was prejudiced by the waiver of either the peremptory challenges or the venue arguments.

Eighteenth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during voir dire of prospective jurors by failing to object to errors.** Petitioner Combs contends that his counsel was ineffective to such a degree that Petitioner's constitutional right to representation was violated. Petitioner bases that contention, in part, upon counsel's failure to object to the following asserted errors during voir dire:

(1) statements by the trial court and prosecutor concerning the fact that the jury would consider imposition of the death penalty only after determining that Petitioner was guilty of

aggravated murder (Transcript, pp.9, 48, 59, 117, 175, 188, 244, 322);

(2) erroneous instructions to the jury from the trial court and the prosecution (Transcript, pp.49, 176, 301, 322, 346, 496, 565);

(3) prosecutorial misconduct in questions and remarks to jurors designed to ascertain that they would be willing to impose the death penalty (Transcript, pp.49, 50, 177, 245, 347, 383, 737, 784, 840); and

(4) statements by the trial court and the prosecution suggesting that the death penalty would be mandatory in the event that the jury concluded that aggravating circumstances outweighed mitigating factors (Transcript, pp.49, 176, 245, 347, 508).

Petitioner contends that trial counsel's failure to object to those asserted errors resulted in prejudice to Petitioner in two respects. First, Petitioner contends that the errors were not remedied at trial. Second, Petitioner contends that counsel's failure to object resulted in the more stringent "plain error" standard on appeal pursuant to Rule 52(B) of the Ohio Rules of Criminal Procedure.

Nineteenth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during voir dire of prospective jurors by failing to adequately examine prospective jurors.** Petitioner Combs contends that trial counsel did not sufficiently probe potential jurors concerning their attitudes toward the death penalty. Petitioner further contends that trial counsel did not attempt to rehabilitate potential jurors who expressed reservations about the death penalty. Petitioner contends

that he was deprived of his right to a fair and impartial jury by virtue of his counsel's ineffectiveness.

Twentieth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by repeatedly conceding Petitioner's guilt.** Petitioner Combs contends that his trial counsel effectively conceded Petitioner's guilt by virtue of the following remarks during opening argument:

> What this all boils down to, ladies and gentlemen, is that one issue, did Mr. Combs commit these offenses with prior calculation and design or was he under the influence of drugs and alcohol. At the conclusion of this trial [defense co-counsel] Mr. Hickey is going to be asking not that you let Mr. Combs go, we are not asking you that, Mr. Combs knows that he has committed these offenses, and he knows that he has to pay the price, but the question, ladies and gentlemen, is should he die. Mr. Hickey is going to be asking that you return verdicts of not guilty on both counts of aggravated murder. He is going to be asking that you return not guilty on both specifications for the death penalty, and he is going to be requesting that you return your verdict of guilty to a lesser offense which we feel Judge Gorman will provide to you.

Transcript, pp.915-16.

Petitioner contends that his trial counsel could not effectively contest the existence of purpose and prior calculation and design when counsel had conceded guilt during opening argument. Moreover, because purpose is an element of murder under O.R.C. §2903.02, Plaintiff contends that counsel conceded purpose by conceding murder. Petitioner further contends that his counsel's ineffectiveness was compounded by the prosecution's

reminder to the jury during closing argument that Petitioner had conceded guilt:

> Was it an accident? Absolutely not. In fact even in opening statements I believe defense counsel alluded to the fact there is really no question that this was a purposeful or intentional killing.

Transcript, p.1227.

Twenty-First Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to the trial court's instructions regarding Petitioner Combs' statement to police**. The Court has previously outlined Petitioner's Fourth Claim for Relief pursuant to which Petitioner claims that the trial court erred in instructing the jury that it could consider Petitioner's statement to Officer Ventre as evidence with respect to the purpose and prior calculation and design elements of the aggravated murder offense. Pursuant to his Twenty-First Claim for Relief, Petitioner Combs contends that his trial counsel's ineffectiveness was manifested by his failure to object to the instruction. Moreover, Petitioner contends, the prejudice resulting from the instruction and his counsel's failure to object was compounded by the prosecutor's use of the statement in closing argument to attack Petitioner's intoxication defense. *See* Transcript, p.1255.

Twenty-Second Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to testimony in which Petitioner referred to himself as "Doc Holliday."** Petitioner contends that he was prejudiced by his counsel's failure to object to Petitioner's reference to Doc Holliday after the shootings. Petitioner also contends

that his counsel was ineffective by virtue of having failed to introduce evidence that Petitioner's father was called "Doc."

Twenty-Third Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to present blood test evidence.** Petitioner Combs contends that blood tests were performed immediately after the shooting and that his counsel failed to introduce evidence of the results of those tests. Moreover, Petitioner contends that his counsel failed to provide effective representation inasmuch as they failed to introduce evidence that other drug tests were not conducted on Petitioner. Petitioner does not explain the relevance of evidence that other drug tests were not performed; however, the Court assumes that Petitioner believes that the evidence would have convinced the trial court that the undated test results could only have related to the test taken immediately upon Petitioner's arrival at the hospital.

Twenty-Fourth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to or introduce evidence of alcohol containers in Petitioner's car.** Petitioner Combs contends that his counsel failed to render effective representation by virtue of their failure to object to inaccurate testimony that no alcohol containers were found in Petitioner's car after the shooting and by failing to introduce evidence that such containers were found.

Twenty-Fifth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to file a motion for**

separation of witnesses. Petitioner Combs contends that his counsel's failure to move for a separation of witnesses and to object to the presence of prosecution witnesses while others testified deprived Petitioner of effective representation.

Twenty-Sixth Claim for Relief. **Petitioner Combs' trial counsel breached their duty of pretrial investigation by failing to obtain a drug and alcohol expert**. Petitioner Combs contends that trial counsel rendered grossly ineffective and inadequate assistance by failing to obtain an expert to assist in preparing and presenting Petitioner's intoxication defense. Petitioner contends that counsel's reliance upon the testimony of Dr. Fisher, the court appointed NGRI (not guilty by reason of insanity) investigator was misplaced and led to the jury's not being informed about Petitioner's disorder and its relationship to his offenses.

Petitioner contends that effective representation would have included securing an expert to interview Petitioner's family members, friends, and others familiar with Petitioner's history, obtaining all pertinent records, and administering all appropriate tests. Petitioner contends that such an investigation would have produced relevant evidence for consideration by the jury in connection with Petitioner's intoxication defense. Petitioner contends that the testimony of an expert could have shed light on Petitioner's condition on the day the offenses were committed.

Twenty-Seventh Claim for Relief. **Petitioner Combs' trial counsel breached their duty of pretrial investigation by failing to obtain a psychological expert**. Petitioner Combs contends that his counsel rendered grossly ineffective and inadequate assistance by failing to secure a psychological expert. Petitioner contends that Ohio's capital scheme guarantees "great

latitude" in the presentation of mitigation evidence. *See* O.R.C. §§2929.03(D)(1) and 2929.04(C). Petitioner contends that the psychological examination performed by Dr. Fisher was woefully inadequate and that counsel should have secured an expert to develop psychological evidence and present such evidence to the jury in mitigation.

In particular, Petitioner contends that effective assistance of counsel would have included securing an expert to examine Petitioner's family background, academic and learning experiences, work history, relationships, sexual and marital functioning, early development experiences, physical health, psychological functioning, and environmental stressors. Petitioner contends that, had this information been available to his trial counsel, it would have significantly affected the trial and mitigation strategy. Petitioner contends that counsel's failure to secure such an expert "left the jury with no reason to spare his life." Petition, p.34. Petitioner also contends that counsel was ineffective in preparing Dr. Fisher to testify.

Twenty-Eighth Claim for Relief. **Petitioner Combs' trial counsel breached their duty of pretrial investigation by failing to obtain a cultural expert.** Petitioner Combs contends that his trial counsel rendered grossly ineffective and inadequate assistance by failing to secure an expert in Appalachian culture. Petitioner contends that such an expert could have explained certain aspects of Petitioner's behavior to the trial jury.

Twenty-Ninth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to file all necessary and appropriate motions.** Petitioner Combs contends that his trial counsel should have filed the following motions:

> all motions necessary to (1) discover and remedy all defects in the investigation and institution of charges against Petitioner, and (2) preclude the admission of all impermissible evidence at trial.

Petition, p.36. The only specific failure on the part of counsel that Petitioner mentions in support of this claim for relief is counsel's failure to move for the suppression of the statements he made to nurse Leigh Ann Wright.

Thirtieth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to the trial court's improper jury instructions**. Petitioner Combs contends, specifically, that his counsel rendered ineffective assistance by failing to object, after the jury was charged, to various instructions given to the jury. Petitioner identifies specifically the instruction concerning the definition of "reasonable doubt," the instruction on intoxication and the related burden of proof, and the instruction on "cause."

Thirty-First Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to move to redact irrelevant testimony**. Petitioner Combs contends that his trial counsel rendered grossly ineffective and inadequate assistance by virtue of their failure to move for the redaction of "other acts" evidence from the videotaped deposition of Tony Liming, which was played to the jury. Petitioner contends that counsel could easily have moved for redaction of the following comments, inasmuch as the testimony was pre-recorded:

> He is, I guess I like him, I mean I liked him. He like did stuff, stole stuff from my mom and I didn't like that.

Transcript, p.944.

Thirty-Second Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to request a jury instruction distinguishing the defense of intoxication and the element of prior calculation and design**. Petitioner Combs contends that his trial counsel should have requested a jury instruction clarifying the distinction between the intoxication defense and the element of prior calculation. Petitioner's contention is based upon his perception that the jury may have believed that, if Petitioner could not prove the defense, the state was relieved of its burden of proving the element. Because, Petitioner argues, the distinction is subtle, the jury could not comprehend the distinction without a clarifying instruction.

Thirty-Third Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to improper peremptory challenges**. Petitioner Combs contends that the prosecution used its peremptory challenges to remove potential jurors who expressed scruples against the imposition of the death penalty but who had not been removed for cause. Petitioner contends that the prosecution's actions infringed upon Petitioner's right to a fair and impartial jury. Petitioner contends that effective assistance of counsel would have included an objection to the use of peremptory challenges in that manner.

Thirty-Fourth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's sentencing phase by failing to object to numerous improper comments by the prosecution.** Petitioner Combs contends that effective assistance of counsel would have included objections to numerous comments by the prosecution during the mitigation phase of sentencing. Petitioner does not identify the comments to which an objection should have been interposed, however. Instead, he identifies the following instructions to the jury by the trial court:

(1) the court's definition of "outweigh;"

(2) the court's definition of "mitigating factors;"

(3) the court's reasonable doubt instruction;

(4) the court's instruction concerning sympathy;

(5) the court's instruction including all of the statutory mitigating factors.

Thirty-Fifth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's sentencing phase by failing to investigate and utilize possible mitigating factors.** Petitioner Combs contends that, prior to trial, effective counsel would have investigated possible mitigating factors by thoroughly reviewing Petitioner's background. Petitioner contends that his trial counsel breached that duty by failing to interview most members of Petitioner's family.

Petitioner further contends that counsel was ineffective in failing to "obtain and supplement an adequate social history and psychological analysis."

Petition, p.39. Petitioner contends that such an analysis would have permitted counsel to present evidence concerning Petitioner's developmental experiences and family dynamics, the parenting capacities of Petitioner's family, Petitioner's academic capacities and achievements, his work experiences and skills, his interpersonal relationships and social adjustment, his sexual history and medical history, and his psychological functioning history.

Petitioner contends that the failure of counsel to conduct such an analysis was compounded by their failure to provide crucial information to Dr. Fisher and to prepare Dr. Fisher to testify. Petitioner contends that that failure resulted in Dr. Fisher's surprise opinion testimony that Petitioner acted purposefully. Petitioner contends that significant mitigation evidence would have been identified by effective counsel.

Thirty-Sixth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's sentencing phase by failing to request a penalty phase instruction distinguishing "excuse" and "mitigation."** Petitioner Combs contends that the prosecution and defense counsel confused the concepts of excuse and mitigation in penalty phase closing arguments. He further contends that effective assistance of counsel would have included a request for a clarifying instruction.

Thirty-Seventh Claim for Relief. **Petitioner's constitutional rights were violated by the appellate court's erroneous determination that the jury, absent the numerous trial errors, would still have imposed death.** Petitioner Combs apparently contends that, by determining that the jury would have imposed death even absent any errors, the appellate court usurped

the function of the jury. Petitioner contends that the prosecution did not prove beyond a reasonable doubt that such a conclusion was warranted.

Thirty-Eighth Claim for Relief. **Petitioner's constitutional rights were violated by the appellate court's failure to consider the cumulative effect of the trial errors.** Petitioner Combs contends that the appellate court considered the asserted errors only sequentially and in isolation and, thus, ignored the cumulative effect of the errors. Petitioner contends that, taken together, the errors require reversal of Petitioner's capital convictions and sentence.

Thirty-Ninth Claim for Relief. **Petitioner Combs was deprived of effective assistance of counsel on his direct appeals.** Petitioner Combs contends that he was denied a meaningful appellate review of his convictions and sentence, to which he is entitled by virtue of O.R.C. §2929.05(A), as a result of the ineffectiveness and inadequacy of his appellate counsel. Petitioner contends, specifically, that counsel failed to avoid the federal procedural default and retroactivity doctrines embodied in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Teague v. Lane*, 489 U.S. 288 (1989).

Petitioner argues that his appellate counsel rendered ineffective representation and exercised unreasonable professional judgment in presenting Petitioner's direct appeals by failing to raise meritorious issues, apparent on the face of the record, which would have resulted in the reversal of Petitioner's capital conviction and/or death sentence, including the following asserted errors:

(1) the jury was improperly instructed that conviction on a death penalty specification was necessary to reach sentencing;

(2) the trial court improperly limited defense counsel's voir dire questions;

(3) during voir dire, the prosecutor impermissibly sought and secured commitments from jurors to sentence Petitioner to death;

(4) the trial court's instructions to the jury, and the prosecutor's improper comments, impermissibly mandated a sentence of death;

(5) the appellate court improperly determined that Petitioner's jury, absent the errors at trial, would still have imposed death;

(6) the trial court allowed inadmissible and prejudicial testimony and excluded relevant testimony from Dr. Fisher;

(7) during voir dire, jurors were repeatedly told incorrect statements of law;

(8) the trial court gave an improper instruction on reasonable doubt;

(9) the trial court improperly instructed the jury on the burden of proving the defense of intoxication;

(10) the trial court gave an erroneous causation instruction;

(11) the trial court failed to instruct the jury on the lesser included offense of voluntary manslaughter, and prohibited defense counsel from conducting voir dire on that issue;

(12) the trial court failed to properly define "outweigh" in its sentencing instructions; and

(13) the prosecutor improperly exercised peremptory challenges.

Petition, p.44.

Petitioner further contends that appellate counsel failed to address numerous instances of failure by trial counsel to protect Petitioner's right to a fair trial and reliable determination of his culpability and sentence. Specifically, Petitioner argues that appellate counsel should have emphasized the following examples of trial counsel's asserted inadequate representation:

(1) trial counsel failed to object to erroneous statements of law and prosecutorial misconduct during voir dire;

(2) trial counsel failed to adequately voir dire prospective jurors;

(3) trial counsel failed to exercise all peremptory challenges;

(4) trial counsel failed to object to improper peremptory challenges;

(5) trial counsel failed to file a motion for separation of witnesses;

(6) trial counsel failed to object to improper instructions by the court;

(7) trial counsel failed to request an instruction on voluntary manslaughter;

(8) trial counsel failed to challenge the exclusion of Dr. Fisher's testimony;

(9) trial counsel failed to object to Dr. Fisher's improper testimony; and

(10) trial counsel conceded Petitioner's guilt.

Petition, p.45.

Petitioner contends that each of the errors asserted was apparent from the trial record. He further contends that appellate counsel's failure to assert the errors constituted substandard appellate representation and prejudiced Petitioner.

Fortieth Claim for Relief. **The Ohio appellate courts denied an adequate remedy for Petitioner's ineffective appellate representation.** Petitioner Combs observes that, at the time he appealed his convictions and sentences, Ohio's statutory scheme afforded every defendant sentenced to death two direct appeals as of right: one to the Ohio Court of Appeals and one to the Ohio Supreme Court. Petitioner contends that his appellate counsel raised few issues to the Ohio Supreme Court and wrote a brief that was grossly inadequate.

Petitioner further contends that he followed the procedure outlined in *State v. Murnahan*, 63 Ohio St.3d 60 (1992), for delayed consideration of claims of ineffectiveness of appellate counsel. Petitioner observes that the Ohio Court of Appeals denied his application in a brief entry stating that Petitioner should have raised his ineffectiveness claim by seeking reconsideration at the time of his original appeal. Petitioner contends that the

court's reasoning would have required appellate counsel to assert the issue of its own ineffectiveness.

Petitioner appealed to the Ohio Supreme Court. That court affirmed the appellate court's decision without opinion.

Petitioner contends that the courts' treatment of his application for delayed reconsideration left Petitioner without a remedy for the ineffectiveness of his appellate counsel. He further contends that the courts ignored the Murnahan delayed reconsideration procedure.

Forty-First Claim for Relief. **The prosecutor impermissibly sought and secured juror commitments to sentence Petitioner to death.** Petitioner Combs contends that, during voir dire, the prosecution violated his right to a fair and impartial jury by securing juror commitments. Petitioner cites, in particular, the following statement by the prosecutor to a potential juror:

> it may very well come down to the fact that you are the very last juror that has to sign a form indicating the imposition of the death penalty on this particular individual seated behind me.

Transcript, pp.49-50. Petitioner observes that the prosecution made similar statements on various occasions throughout the jury selection process. *See* Transcript, pp.177, 245, 347, 383, 737, 784, 840.

Petitioner contends that the prosecution's questions exceeded the proper scope of inquiry as identified in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Specifically, Petitioner argues that the prosecution's statements and questions to jurors were prejudicial to Petitioner inasmuch as they created a presumption of guilt.

Forty-Second Claim for Relief. **The prosecutor repeatedly misstated the law to jurors during voir dire.** Petitioner Combs contends that he was deprived of a fair and impartial jury by virtue of various misstatements of law by the prosecution during voir dire of potential jurors. Specifically, he contends that the following misstatements were prejudicial:

(1) "The prosecutor told the jurors that the aggravating factors had to outweigh any of the mitigating factors presented by Petitioner"(Petition, p.50, citing Transcript, pp.49, 176); and

(2) "The prosecutor improperly characterized the balancing process on other occasions"(Petition, p.50, citing Transcript, pp.301, 346, 565, 703-04).

Forty-Third Claim For Relief. **The prosecution improperly exercised their peremptory challenges.** Petitioner Combs contends that the prosecution exercised all of its peremptory challenges against potential jurors who expressed moral reservations about the death penalty. Petitioner argues that he was denied his right to a fair and impartial jury by virtue of the exclusion of such persons from the jury.

Forty-Fourth Claim for Relief. **The prosecution admitted improper evidence during the culpability phase of Petitioner's trial.** Petitioner Combs contends that the prosecution offered and secured the admission of improper evidence during the trial to Petitioner's prejudice. First, Petitioner contends that the prosecution improperly elicited other acts evidence in violation of the Ohio Rules of Evidence. Specifically, Petitioner objects to the prosecution's opening statement that Petitioner had abused Peggy Schoonover. *See* Transcript, p. 891. He also objects to the prosecution's eliciting testimony that,

prior to her death, Peggy Schoonover had stated "I'm ready for him, I've got my mace." *See* Transcript, p.976. Petitioner contends that neither the prosecution's opening statement nor the testimony concerning Peggy Schoonover's statement was admissible under Rule 404(B), which addresses "other acts" evidence.

Petitioner Combs next contends that he was prejudiced by the prosecution's introduction of testimony by hospital personnel that, after he was shot, Petitioner was uncooperative, verbally abusive, obnoxious, belligerent, and angry. *See* Transcript, pp.1059-60, 1089, 1256. Petitioner contends that such evidence was irrelevant and prejudicial.

Petitioner Combs further contends that the prosecution improperly elicited testimony from Dr. Fisher concerning the purposefulness of Petitioner's actions. *See* Transcript, p.1388. Petitioner contends that the prosecution impermissibly highlighted that testimony during the penalty phase closing, even though purpose was not an issue in mitigation. *See* Transcript, p.1399.

Petitioner Combs contends that the prosecution impermissibly contrasted the aggravating circumstance in his case[1] with the non-charged statutory aggravators. *See* Transcript, p.1395. Petitioner contends that the prosecution acted improperly in light of the fact that no one aggravating factor has been identified as more serious than another.

Petitioner next objects to the following statements by the prosecution during the penalty phase:

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[1] The aggravating circumstance was the killing of two people in the same course of conduct, pursuant to O.R.C. §2929.04(A)(5).

> What about the extra shells taped to the chest? Who were those for? Officer Ventre? Officer Neil? Perhaps a good samaritan that might have seen this, maybe Mr. Hughes sitting on top of that planter if he would have tried to stop this. He was going to take out anybody he had to to accomplish his intentional act.

Transcript, p.1401. Petitioner contends that the statement was "an improper and unfairly prejudicial way of arguing the course of conduct specification." Petition, p.54. Petitioner also contends that the prosecution improperly suggested that the victims' "totally good lives" were aggravating factors. *See* Transcript, p.1406.

Finally, Petitioner Combs contends that the prosecution improperly commented upon Petitioner's decision to make an unsworn statement during the penalty phase and by suggesting that mitigating circumstances must excuse the crime, rather than mitigate against the imposition of the death penalty. *See* Transcript, pp.1419-20, 1426. Petitioner contends that he was prejudiced by the frequency and severity of the asserted acts of prosecutorial misconduct.

Forty-Fifth Claim for Relief. **The prosecution improperly cited victim impact evidence during trial**. Petitioner Combs contends that the prosecution impermissibly injected victim impact evidence into the trial by mentioning prior acts of abuse against Peggy Schoonover and by requesting that the death penalty be imposed on behalf of the victims' families. *See* Transcript, p.1454. Petitioner also objects to the prosecution's references to the desperation of the victims and the horror that surrounded the crime. *See* Transcript, pp.1230, 1303.

Petitioner contends that victim impact evidence was not admissible in Ohio at the time of the offenses underlying the instant petition. Even if victim impact evidence was admissible pursuant to *Payne v. Tennessee*, 501 U.S. 808 (1991), Petitioner contends that the evidence introduced by the prosecution exceeded the bounds identified in that decision.

Forty-Sixth Claim for Relief. **The prosecution improperly confused the jury as to Petitioner Combs' mitigation evidence**. Petitioner Combs asserts that he was prejudiced by various improper references of the prosecution during the penalty phase of his trial. Petitioner contends that those references impermissibly undermined his case for mitigation.

One such reference identified by Petitioner was to the terror and horror experienced by the victims and the effects of their deaths on their families. Petitioner contends that the "heinousness" of the crimes was not the statutory aggravating factor and that, even if heinousness had been the statutory aggravating factor, heinousness, without more, is simply too vague to be properly considered.

Petitioner objects to the same references on the ground that the introduction at the penalty phase of victim impact evidence was improper at the time of Petitioner's trial and sentencing. Petitioner contends that the victim impact references inflamed the jury, destroyed the rationality required in capital sentencing, and improperly weighted the scales toward death.

Petitioner Combs next contends that the prosecution improperly attacked Petitioner's mitigation evidence of intoxication and drug involvement. Petitioner's specific objection is to the prosecution's mischaracterization of the evidence as not an "excuse."

Because the evidence was introduced in mitigation and not for the purpose of excusing Petitioner's conduct, Petitioner contends that the prosecution's argument was improper.

Forty-Seventh Claim for Relief. **The state improperly interfered with Petitioner's efforts to interview witnesses.** Petitioner Combs contends that probation officer Linda Elliott did not refuse Petitioner's request for an interview of her own volition. Rather, Petitioner claims that the prosecution impermissibly acted to interfere with Petitioner's ability to interview Ms. Elliott and that the prosecution's insistence on the presence of a prosecutor was the equivalent of preventing the interview.

Forty-Eighth Claim for Relief. **There was insufficient evidence that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.** Petitioner Combs contends that he was prejudiced by the imposition of the death penalty in spite of the existence of the following mitigation evidence, which, he asserts, clearly demonstrated that the mitigating circumstances outweighed the aggravating factors:

(1) Petitioner's serious drug and alcohol abuse;

(2) the fact that Petitioner had been drinking and using drugs at the time of the offense;

(3) Petitioner's suicidal tendencies;

(4) the difficulties Petitioner experienced in his relationships with the two victims;

(5) Petitioner's loving relation-ship with his sons, as well as his concern that he would never see his son Joey again;

(6) Petitioner's genuine remorse after the offenses;

(7) the loss of Petitioner's right arm and full use of his left arm; and

(8) Petitioner's having been threatened by Joan Schoonover.

Petition, p.59.

Forty-Ninth Claim for Relief. **Petitioner Combs' death sentence is disproportionate to other Hamilton County sentences.** Petitioner Combs contends that his sentence is disproportionate and observes that "[f]rom 1982 through 1985, no fewer than ten defendants in Hamilton County were indicted and convicted of aggravated murder in the commission of aggravated robbery who were capitally eligible but not capitally charged." Petition, p.60. Petitioner contends that his crimes were no worse and no more deserving of death than the crimes of those ten defendants.

Fiftieth Claim for Relief. **Ohio's proportionality review process is flawed.** Petitioner Combs contends that he would not have been sentenced to death if Ohio had had a proper proportionality review system. Petitioner bases his contention upon Ohio's statutory requirement for a proportionality review, O.R.C. §2929.05(A), and the interpretation of that requirement by the Ohio Supreme Court in *State v. Steffen*, 31 Ohio St.3d 111, syllabus ¶1 (1987), *cert. denied*, 485 U.S. 916 (1988).

Petitioner Combs also attacks Ohio's system for appropriateness review on the ground that it does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). Petitioner argues that Ohio's schemes violate his right to due process, guaranteed by the Fifth and Fourteenth Amendments.

Fifty-First Claim for Relief. **The system used by the Hamilton County Prosecutor's office in seeking and securing capital convictions and death sentences is discriminatory.** Petitioner Combs contends that the review of his conviction and sentence by the Ohio Court of Appeals and the Ohio Supreme Court was meaningless. Petitioner contends that the Court of Appeals simply adopted *in toto* the proposed findings of fact and conclusions of law prepared by the prosecution. He further contends that the Ohio Supreme Court gave no significant consideration to Petitioner's claims. Petitioner contends that meaningless review is the standard in the Hamilton County Court of Appeals as well as the Ohio Supreme Court.

Fifty-Second Claim for Relief. **The Ohio death penalty scheme is unconstitutional.** Petitioner Combs contends that Ohio's death penalty scheme violates the Eighth Amendment's prohibition against cruel and unusual punishments. He argues that the death sentence, as imposed in his case, is excessive in that it (1) makes no measurable contribution to acceptable goals of punishment and (2) is grossly out of proportion to the gravity of the offense. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977).

More specifically, Petitioner contends that Ohio's scheme allows for the imposition of the death penalty in an arbitrary and discriminatory manner. He points to

statistics that tend to show that death sentences are given disproportionately to persons who are members of racial minorities. Petitioner is not a member of a racial minority.

Petitioner also contends that Ohio's death penalty statutes do not require the prosecution to prove the absence of mitigating circumstances and that the death penalty is the only appropriate penalty before the death penalty may be imposed. Rather, Petitioner contends, Ohio's statutes require the defendant to prove the existence of mitigating circumstances by a preponderance of the evidence. Petitioner contends that the unfairness of that scheme is compounded by the fact that no method exists to ensure that the proper weighing and consideration is accomplished.

Petitioner next contends that the Ohio statutes violate constitutional mandates inasmuch as they do not separate the consideration of statutory aggravating circumstances from the determination of guilt. Petitioner contends that, by permitting consideration of evidence of the aggravating specifications with evidence of guilt, the Ohio scheme runs afoul of mandates of the United States Supreme Court. *See Woodson v. North Carolina*, 428 U.S. 280 (1976).

Petitioner also attacks the failure of the Ohio scheme to provide the sentencer with the option to choose a lesser sentence when only aggravating factors are present or when aggravating factors outweigh mitigating circumstances. In essence, Petitioner contends, the Ohio system creates a mandatory death penalty.

Petitioner Combs also contends that Ohio's death penalty scheme is unconstitutional inasmuch as it fails to require that aggravating factors substantially outweigh mitigating circumstances before a sentence of death may

be imposed. Petitioner observes that the original sentencer is not required to determine whether death is the only appropriate penalty, while reviewing courts are required to make such a determination. Petitioner contends that due process requires that the same standards apply at both levels.

Fifty-Third Claim for Relief. **Petitioner Combs was denied his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because his death sentence is unreliable and inappropriate and violates the Eighth and Fourteenth Amendments.** Pursuant to his final claim for relief, Petitioner Combs contends that the combined effect of the errors that occurred throughout his trial and the post-conviction proceedings mandates that his death sentence be set aside.

B. Claims not presented to the Ohio courts on direct appeal.

Respondent contends that the following Claims for Relief are procedurally barred, inasmuch as Petitioner did not raise them on direct appeal in the Ohio courts: the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Eleventh, Fourteenth, Fifteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-Second, Twenty-Fourth, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, Thirtieth, Thirty-First, Thirty-Second, Thirty-Third, Thirty-Fourth, Thirty-Fifth, Thirty-Sixth, Thirty-Seventh, Thirty-Eighth, Thirty-Ninth, Forty-First, Forty-Second, Forty-Fourth, Forty-Sixth, Forty-Seventh, Forty-Eighth, Fifty-First, and Fifty-Third. Petitioner advances various arguments against the imposition of the procedural bar.

1. Petitioner's Argument's Against the Procedural Bar

a. Ineffective assistance of counsel

Petitioner maintains that "cause" exists for his failure to raise the procedurally barred claims on direct appeal and that he can demonstrate a resulting "prejudice." *See Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977). Petitioner argues that the ineffective assistance of his counsel during the guilt and penalty phases of his trial and the ineffective assistance of his counsel on appeal establish cause for his failure to raise the claims that are arguably barred.

None of the alleged instances of ineffective assistance of counsel establish cause for failing to raise the claims the Ohio courts held were procedurally barred for failure to present them on direct appeal. Petitioner has failed to demonstrate that his attorneys fell below the standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As is discussed below, Petitioner's counsel acted within the reasonable range of competence for defense counsel in death penalty cases.

b. Unreliability of the trial and review process and fundamental miscarriage of justice

Petitioner hints that he was prejudiced by the alleged procedurally barred constitutional errors because of the general unreliability of the trial and review process in his capital case. That claim lacks merit. He also argues that the errors resulted in a fundamental miscarriage of justice. To establish a "fundamental miscarriage of justice" a petitioner must demonstrate that a specific constitutional violation has probably resulted in the conviction of someone who is actually innocent.

Schlup v. Delo, 513 U.S. 298, 326-31 (1995). A petitioner challenging imposition of the *death penalty* (as opposed to his conviction for murder) must prove by clear *and convincing evidence* that no reasonable juror would have found the petitioner eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 352 (1992). Here, Petitioner has made no colorable claim of actual innocence. As the Supreme Court of Ohio detailed in its decision, the evidence of Mr. Combs' guilt is very substantial. *State v. Combs*, 62 Ohio St.3d at 293-94.

c. Jury instruction errors

Petitioner's Ninth, Eleventh, Fourteenth, and Fifteenth Claims for Relief raise constitutional claims concerning errors in the trial court's jury instructions. These claims were not raised on direct appeal. They were presented to the Ohio courts for the first time in petitioner's post-conviction petition to vacate or set aside sentence. The trial court and the Ohio Court of Appeals held that these claims were barred by the doctrine of *res judicata*.

Some habeas petitioners have argued that such claims are not barred by procedural default because the Supreme Court of Ohio addressed on the merits jury instruction issues raised in postconviction petitions in *State v. Howard*, 42 Ohio St.3d 18 (1989), *cert. denied*, 493 U.S. 873 (1989), and *State v. Bell*, 73 Ohio St.3d 32, 34 (1995). Those petitioners argue that these two decisions suggest an implicit exception to the *Perry* waiver rule for constitutional claims regarding jury instructions.

That argument is based upon a misreading of *Howard* and *Bell*. In *Howard*, the issue was whether the defendant was denied the effective assistance of counsel on direct appeal by his appellate counsel's failure to

assign as error a constitutionally erroneous *Allen* charge. Defendant's trial counsel had interposed an objection to the charge. In determining whether the defendant was denied the effective assistance of appellate counsel, the Supreme Court reviewed the merits of the challenge to the *Allen* charge. *See Howard*, 42 Ohio St.3d at 23 ("we find that the use of the *Allen* charge was improper, we agree with the court of appeals that failure by appellee's former counsel to raise this error on direct appeal, for whatever reason, constituted ineffective assistance of counsel . . . .").

The issue in *Bell* was whether the defendant had shown good cause under Ohio Appellate Rule 26(B) for his untimely motion to reopen his direct appeal. Defendant filed his motion to reopen three and one-half years after the decision he sought to reopen. He argued that his lack of access to a full trial transcript established cause for his failure to move to reopen earlier. The Ohio Supreme Court held that the defendant did not need a transcript to identify the two issues he sought to raise in his motion to reopen. *See Bell*, 73 Ohio St.3d at 34. The court concluded that the claims "should have been evident at all stages of postconviction relief." *Id.* The Ohio Supreme Court did not hold that the claims, one of which involved an allegedly improper jury instruction, could have been *raised* in postconviction. It merely held that there was no reason for the three and one-half year delay in moving to reopen, inasmuch as the claim should have been known to the defendant during the time when he was pursuing postconviction relief, *i.e.*, after the final decision on the direct appeal he sought to reopen.

Neither *Howard* nor *Bell* stands for the proposition that challenges to jury instructions need not be made on direct appeal or for the proposition that a petitioner may raise them in a petition to vacate or set aside sentence. The long-standing Ohio rule is that errors in jury

instructions are waived if not timely presented to the court. *See Engel v. Isaac*, 456 U.S. 107, 124-25 (1982); *Rust v. Zent*, 17 F.3d 155, 158, 160 (6th Cir. 1994); *State v. Underwood*, 3 Ohio St.3d 12, syllabus (1983); *State v. Durkin*, 66 Ohio St.2d 158, 161 (1981).

d. Petitioner's trial counsel was also appellate counsel

Petitioner maintains that the procedural bar does not apply to ineffective assistance of counsel claims when a petitioner was represented on appeal by his trial attorney. Petitioner relies on *Ciak v. United States*, 59 F.3d 296, 303-04 (2d Cir. 1995), but his reliance is misplaced. *Ciak* and the other cases upon which Petitioner relies stem from the unique circumstance of representation by the same attorney or attorneys at trial and on appeal. In Petitioner's case, he had new appellate counsel, Mr. Hoeffle, to assist trial counsel, Mr. Stidham, on appeal. To the extent that Mr. Stidham was not likely to recognize or assert his own ineffectiveness, Mr. Hoeffle was certainly competent to do so and was free of any conflict of interest with regard to Mr. Stidham's alleged errors.

Ohio reasonably requires of record ineffective assistance of counsel claims to be raised on direct appeal when the defendant is represented by a combination of trial counsel and new counsel on direct appeal. Ohio distinguishes between claims dependent solely on facts of record and those requiring evidence *dehors* the record for adjudication. Ohio imposes a procedural bar only as to those ineffective assistance of trial counsel claims which rest on

facts of record that could have been determined on direct appeal. Nothing in *Breechen v. Reynolds*, 41 F.3d 1343, 1363-64 (10th Cir. 1994), *cert. denied*, 515 U.S. 1135 (1995), precludes a state from adopting that flexible approach and a federal court enforcing any resulting procedural bar.

e. Trial court abandoned its judicial function and state courts improperly arrived at conclusion that procedural bar applies

Section 2953.21(C) of the Ohio Revised Code requires the trial court to review the record and "determine whether there are substantive grounds for relief." If the trial court determines there are not and dismisses the petition without a hearing, "it shall make and file findings of fact and conclusions of law with respect to such dismissal." *Id.* The Supreme Court of Ohio has held that the trial court must make findings of fact and conclusions of law. *State v. Mapson*, 1 Ohio St.3d 217, 219 (1982). Petitioner argues that a finding of procedural default can only be made based on the trial court's findings of fact, and that the Ohio appellate courts are not permitted to make findings of fact or conclusions of law regarding procedural default. *See State v. Hester*, 45 Ohio St.2d 71 (1976); *State v. Lester*, 41 Ohio St.2d 51 (1975). Petitioner further asserts that the trial court abandoned its judicial function by making a wholesale adoption of the findings of fact and conclusions of law submitted to it by the prosecutor. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964); *Morrison v. Char*, 797 F.2d 752, 755 n.3 (9th Cir. 1986). Because of the alleged abandonment by the trial court of its judicial function, Petitioner urges this Court not to recognize the procedural default found by the trial court.

Although a reasonable preference exists for a trial court entering judgment to prepare its own findings of fact and conclusions of law or to carefully review and revise findings and conclusions submitted by counsel, no requirement exists under either Ohio or federal law that a judge do so. For example, in *United States v. El Paso Natural Gas Co.*, 376 U.S. at 656, the United States Supreme Court was critical, but did not find reversible error was committed, when a judge after the trial of a civil antitrust suit orally stated that he would enter judgment for the defendant, directed defendant's counsel to prepare findings of fact and conclusions of law, and later adopted them verbatim:

> Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184-185. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.

(Footnote omitted.) No Ohio case supports the proposition that O.R.C. §2953.21(C) or (E) requires a common pleas court judge to prepare his or her own findings of fact and conclusions of law.

Here, the Court of Appeals reviewed the trial court's findings of fact and conclusions of law, including those related to the trial court's determination that claims based on evidence of record that were not raised on direct appeal could not be presented for the first time in a petition for postconviction relief. The Court of Appeals independently reviewed the record and ruled on the *res judicata* issues.

On February 1, 1995, the Ohio Supreme Court issued an Entry in Petitioner's appeal from the lower state courts' decisions denying him postconviction relief. That Entry stated as follows:

> Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

Exhibit VV to Return of Writ.

On March 15, 1995, in consideration of Petitioner's motion for reconsideration, the Ohio Supreme Court issued an Entry stating the following:

> IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby denied.

Exhibit XX to the Return of Writ.[2]

---

[2] Petitioner's application for delayed reconsideration of his claims of ineffectiveness of appellate counsel was denied by the Ohio Court of Appeals on February 24, 1994:

> This cause came on to be considered upon the application of defendant-appellant Ronald Dean Combs for delayed reconsideration of the decision and judgment entered by this Court in *State v. Combs* (Sept. 19, 1990), Hamilton App. No. C-880156, unreported, and the memoranda filed by the parties in connection therewith.
>
> The within application raises a claim of ineffective assistance of appellate counsel and was brought

> pursuant to *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, and App.R. 26, which was amended on July 1, 1993. The application is denied because appellant has failed to show good cause for filing it more than ninety days after this Court's judgment was journalized, as required by App.R. 26(B)(2)(b).
>
> Wherefore, the Court, being fully advised in the premises, finds that said application is not well taken and that the same ought to be and hereby is denied.

In a footnote, the Court of Appeals concluded as follows:

> While appellant's application was filed prior to the effective date of the amendment to App.R. 26, under App.R. 33(M) the amendment governs all further proceedings in pending actions unless its application would work injustice. Injustice does not result from application of the amended rule to this case because (1) the time period for filing an application has been lengthened substantially, and (2) a showing of good cause for untimely filing was also required in previous delayed reconsideration proceedings in this Court. See, *e.g.*, Entry Denying Application for Reconsideration (Aug. 4, 1992), in *State v. Zuern*, Hamilton App. No. C-840803.

Exhibit AAA to Return of Writ. The Ohio Supreme Court affirmed in a brief entry on July 6, 1994. Exhibit DDD to the Return of Writ. That court denied rehearing on August 24, 1994. Exhibit GGG to Return of Writ.

The Supreme Court of the United States has adopted a "plain statement" rule for determining whether state court's have enforced a procedural bar to further consideration of an alleged federal constitutional error:

> [A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "'clearly and expressly'" states that its judgment rests on a state procedural bar. *Caldwell*, 472 U.S., at 327, quoting *Long*, 463 U.S., at 1041.

Harris v. Reed, 489 U.S. 255, 266 (1989)(footnote omitted). On habeas corpus review, the district court must look to the last "explained" state court judgment to determine whether a state procedural bar has been enforced. *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991); *McBee v. Abramajtys*, 929 F.2d 264, 267 (6th Cir. 1991).

Here the Ohio Court of Appeals' August 24, 1994, decision is the last "explained" state court decision, and it holds that claims that were not previously raised are waived. The Ohio Supreme Court had an opportunity to review the Court of Appeals' *res judicata* determination, but it overruled Petitioner's motion for leave to appeal. Exhibit VV to Return of Writ.

The cases often cited for the proposition that subsequent rulings by the state's higher court negate the effect of the enforcement of the procedural bar in the last "explained" decision are inapposite. In each, the last "explained" decision by the state court expressly and unequivocally ruled on the merits of the petitioner's constitutional claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *Ulster County Court of Appeals v. Allen*, 442 U.S. 140, 147-158 (1979); *Horsley v. State of Alabama*, 45 F.3d 1486, 1489 (11th Cir. 1995), *cert. denied*, __ U.S._,

116 S.Ct. 410 (1995); *Rice v. Marshall*, 816 F.2d 1126, 1129 (6th Cir. 1987). The state procedural bar was actually held to *preclude* federal habeas corpus review in *McBee v. Grant*, 763 F.2d 811, 813 (6th Cir. 1985).

f. The procedural bar should not be enforced in this case.

The Supreme Court of Ohio held in *State v. Perry*, 10 Ohio St.2d 175, syllabus ¶¶7 and 9 (1967), that all claims that were or could have been raised at trial must be presented on direct appeal and that the Ohio court's final decision on direct appeal is *res judicata* and bars further consideration by the Ohio courts in a postconviction proceeding. This holding will be referred to hereinafter as the "*Perry* rule." Petitioner argues that the *Perry* rule should not bar consideration of his claims in federal habeas corpus because the rule has not been consistently applied, the rule rests on an Ohio postconviction system that does not meet the requirements of due process, and the rule requires ineffective assistance of trial counsel claims to be raised on direct appeal.

The United States Court of Appeals for the Sixth Circuit has long recognized the *Perry* rule and enforced procedural bars based on that rule. *See, e.g., Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994); *Leroy v. Morris*, 757 F.2d 94, 100 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985). None of the arguments advanced by Petitioner has sufficient weight to cause this Court to reconsider its long adherence to enforcing the *Perry* procedural bar, nor has Petitioner demonstrated that enforcement of the procedural bar in his case is unfair or denies him due process of law.

State procedural rules bar federal habeas corpus review only when they are "firmly established and

regularly followed . . . ." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). *See also Ford Barr v. Columbia*, 378 U.S. 146, 149 (1964). Here, the Ohio courts refused to hear those claims Petitioner raised for the first time in his postconviction petition that could have been presented on direct appeal. Petitioner does not contest the finding that the claims are based on evidence of record and could have been raised on direct appeal, so the question presented is whether Ohio has a firmly established and regularly followed practice of requiring criminal defendants to raise alleged errors at the earliest opportunity and to present of record claims to the trial court and the Ohio Court of Appeals on direct appeal. This Court answers the question in the affirmative.

The backbone of Ohio's requirement that alleged errors be presented to the Ohio courts at the earliest opportunity is the contemporaneous objection rule. If an objection that could be made at trial is not made, it is waived and will not thereafter be considered by the Ohio courts. *See, e.g., State v. Underwood*, 3 Ohio St.3d 12, syllabus (1983)("[t]he failure to object to a jury instruction constitutes a waiver of any claim of error thereto . . . ."); *State v. Durkin*, 66 Ohio St.2d 158, 161 (1981)(failure to object to jury instruction misallocating burden of proof is waiver); *State v. Wallen*, 25 Ohio St.2d 45, 46 (1972).

The United States Supreme Court and the United States Court of Appeals for the Sixth Circuit have long recognized and enforced Ohio's contemporaneous objection rule. *Osborne v. Ohio*, 495 U.S. 103, 124 (1990)(recognizing Ohio's long-standing contemporaneous objection rule, but holding that if a defendant objects and it is clear the trial judge rejects the argument, he does not have to repeatedly object to preserve the error for federal habeas review); *Engle v. Isaac*, 456 U.S. 107, 124-25 (1982)(failure to object to jury instructions; Rule 30, Ohio

R. Crim. P.); *Lockett v. Arn*, 728 F.2d 266, 269 (6th Cir. 1984)(failure to object to jury instruction).

The Ohio courts have similarly consistently held that claims that can be adjudicated based on facts of record must be presented on direct appeal and that, if they are not, they are waived and cannot thereafter be presented to the Ohio courts. *See, e.g., State v. Roberts*, 1 Ohio St.3d 36, 38-39 (1982)(failure to raise Court of Appeals' alleged error in reforming sentence in motion for leave to appeal to Supreme Court of Ohio from that decision waived right to present error to Ohio courts); *State v. Phillips*, 27 Ohio St.2d 294, 302 (1971); *Toledo v. Reasonover*, 5 Ohio St.2d 22, 25 (1965)("[t]he Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court."). The United States Court of Appeals for the Sixth Circuit has consistently enforced such waivers and refused to consider in habeas corpus the merits of federal claims waived by virtue of a petitioner's failure to timely present the claim to the Ohio courts. *See, e.g., Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994). In *Rust*, the petitioner had failed to present a claim on direct appeal, and the Ohio Court of Appeals denied a subsequent motion for delayed appeal on the ground that the decision on direct appeal was *res judicata*. The United States Court of Appeals for the Sixth Circuit held that the petitioner was barred from presenting the claim in federal habeas corpus. *See also Ewing v. McMackin*, 799 F.2d 1143, 1149 (6th Cir. 1986); *Leroy v. Morris*, 757 F.2d 94, 100 (6th Cir.)(claim raised at trial but not on direct appeal to the Ohio Court of Appeals cannot be considered in federal habeas), *cert. denied*, 474 U.S. 831 (1985).

Sound reasoning supports Ohio's rule requiring that claims be presented at the first opportunity and that the federal courts enforce procedural bars imposed

against defendants who fail to timely present their claims to them. Principles of comity and federalism require enforcement of state court-imposed procedural bars that promote significant judicial interests. *Francis v. Henderson*, 425 U.S. 536, 541 (1976). Ohio's *Perry* rule promotes important interests of the judicial system. It encourages finality of judgments. *Engle v. Isaac*, 456 U.S. 105, 127 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977). Such rules also prevent tactical maneuvering by defense counsel to get two bites at the apple. *Reed v. Ross*, 468 U.S. 1, 11 (1984); *Wainwright v. Sykes*, 433 U.S. at 89; *Francis v. Henderson*, 425 U.S. at 540-41. Constitutional issues are resolved at the earliest opportunity when memories are freshest and any constitutional error can be speedily remedied. *Reed v. Ross*, 468 U.S. at 10-11; *Engle v. Isaac*, 456 U.S. at 128; *Francis v. Henderson*, 425 U.S. at 540. Deciding outcome determinative issues at an early stage permits avoidance of the costs associated with prolonged proceedings. *See Francis v. Henderson*, 425 U.S. at 540. The *Perry* rule promotes accurate and efficient judicial decision making, *Reed v. Ross*, 468 U.S. at 10, and emphasizes that the trial is the place where society's resources are concentrated to vindicate constitutional rights and adjudicate guilt or innocence and that issues of record at trial will be promptly adjudicated on direct appeal. *See Engle v. Isaac*, 456 U.S. at 127; *Wainwright v. Sykes*, 433 U.S. at 90.

By enforcing state court procedural defaults that implement significant judicial interests, the federal courts give the state courts an opportunity to mend their own fences and avoid federal intrusion, thus strengthening federalism. *Engle v. Isaac*, 456 U.S. at 129. Enforcement of the bar encourages state courts to enforce constitutional rights by recognizing the importance of their decisions adjudicating those rights. *Id.* at 127.

Further, states maximize their opportunities to punish admitted offenders. *Id.* at 127-28.

Petitioner argues that this Court should not enforce the procedural bar here because the Supreme Court of Ohio has not consistently enforced the *Perry* rule, especially in death penalty cases. The Supreme Court of Ohio announced in *State v. Zuern*, 32 Ohio St.3d 56, 63 (1987), *cert. denied*, 484 U.S. 1047 (1988), that

> because of the nature of the case and the exacting review necessary where the death penalty is involved, we reserve the right to consider the constitutional challenges in particular cases.

Petitioner argues that such a policy demonstrates "inconsistent" application of the *Perry* rule. Petitioner further argues that, because the procedural bar is not "consistently" applied, this Court should review the merits of the claims the Ohio courts have held waived under *Perry*.

Petitioner's argument lacks merit. First, all courts reviewing the imposition of the death penalty have an obligation to act with special care to see that justice is done. As the Supreme Court of the United States held in *Woodson v. North Carolina*, 428 U.S. at 305, "the penalty of death is qualitatively different from a sentence of imprisonment, however long" because of its finality; consequently, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (Footnote omitted). Second, the Court recognizes that the Supreme Court of Ohio has on occasion reviewed an alleged constitutional error not properly preserved below without expressly stating a rationale for its departure from the *Perry* rule. *See, e.g., State v. Benner*, 40 Ohio St.3d 301, 315 (1989), *cert. denied*, 494 U.S. 1090 (1994); *State v.*

DePew, 38 Ohio St.3d 275, 284-85 n.4 (1988), *cert. denied*, 489 U.S. 1047 (1989); *State v. Holloway*, 38 Ohio St.3d 239, 244 (1988), *cert. denied*, 492 U.S. 925 (1989); *State v. Post*, 32 Ohio St.3d 380, 382 (1987)(reviewing an argument based on the then recently decided *Booth v. Maryland*, 482 U.S. 496 (1987)), *cert. denied*, 484 U.S. 1079 (1988); *State v. Barnes*, 25 Ohio St.3d 203, 206 (1986); *State v. Buell*, 22 Ohio St.3d 124, 142 (*sua sponte* considered whether the prosecutor's argument that the jury was recommending, not imposing, the death penalty was error in light of the United States Supreme Court's then recent decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985)), *cert. denied*, 479 U.S. 871 (1986). That court has, however, also frequently found and invoked waiver in death penalty cases. *See, e.g., State v. Greer*, 39 Ohio St.3d 236, 247 (1988), *cert. denied*, 490 U.S. 1028 (1989); *State v. Spisak*, 36 Ohio St.3d 80, 83 (1988), *cert. denied*, 489 U.S. 1071 (1989); *State v. Rogers*, 32 Ohio St.3d 70, 73 (1987), *cert. denied*, 484 U.S. 958 (1987); *State v. Scott*, 26 Ohio St.3d 92, 100, 103, 108, 109 (1986), *cert. denied*, 480 U.S. 923 (1987); *State v. Jenkins*, 15 Ohio St.3d 164, 226, 237 (1984), *cert. denied*, 472 U.S. 1032 (1985). Third, many cases cited as deviations from the *Perry* rule are not. Rather, they are examples of the Supreme Court of Ohio applying the plain error exception to *Perry*. *See, e.g., State v. Long*, 53 Ohio St.2d 91 (1978). *See also State v. Lawrence*, 44 Ohio St.3d 24, 27 (1989); *State v. Broom*, 40 Ohio St.3d 277, 281 (1988), *cert. denied*, 490 U.S. 1075 (1989). Fourth, the Supreme Court of Ohio has expressly rejected the argument that it should less strictly enforce its procedural rules in death penalty cases:

> Appellant premises his request upon the fact that we are here considering imposition of capital punishment and ought to set aside technical rules of procedure "for the sake of justice". . . . The mere fact that punishments differ provides no basis to assert that procedural rules should differ in their

> application to the crime charged. We hold that capital defendants are not entitled to special treatment regarding evidentiary or procedural rules. . . . We will utilize the doctrine of waiver where applicable; yet we must also retain the power to *sua sponte* consider particular errors under exceptional circumstances. *See e.g., State v. Rogers*, 32 Ohio St.3d 70, 512 N.E. 2d 581 (1987); *State v. Zuern*, 32 Ohio St.3d 56, 512 N.E. 2d 585 (1987). This we shall continue to do under our plain error standard.

State v. Greer, 39 Ohio St.3d at 244.

Although not articulated as the ground for review on the merits in the decisions set out above in which no explanation was given for reviewing a waived claim, all the decisions are consistent with a prophylactic plain error review. These relatively few cases do not represent the sort of well-established policy of routinely considering claims subject to the waiver rule that has led federal courts to refuse to enforce procedural bars imposed by state courts. *See Adams v. Dugger*, 816 F.2d 1493, 1497 (11th Cir. 1987), *cert. denied*, 485 U.S. 933 (1988); *Van Pilon v. Reed*, 799 F.2d 1332, 1341 (9th Cir. 1986); *Wheat v.Thigpen*, 793 F.2d 621, 625-27 n.3 and n.4 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987). Petitioner has not cited a single case that stands for the proposition that a consistently enforced state procedural bar that is not invoked on some occasions for unexplained reasons generally consistent with plain error review should not be enforced in federal habeas corpus. Ohio has clearly communicated to litigants that they may not raise claims on direct appeal unless an objection was made at trial and that they cannot raise errors in the Supreme Court of Ohio unless they first presented them as assignments of error in the Ohio Court of Appeals.

Habeas petitioners often maintain that there has been some inconsistency in the application of the *Perry* rule to claims of ineffective assistance of trial counsel. This argument was rejected by the Court in *John W. Byrd v. Terry Collins, Warden*, C-1-94-167 (S.D. Ohio E.D. Opinion and Order issued July 28, 1995) at pp. 31-36. Since *State v. Cole*, 2 Ohio St.3d 112, syllabus (1982), the Ohio courts have consistently held as follows:

> Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief.

Cole is not in conflict with *State v. Cooperrider*, 4 Ohio St.3d 226, 228 (1983), in which the court declined to hear an ineffective assistance of counsel claim on direct appeal because it was not possible to determine the claim without resort to facts not of record. Both cases stand for the consistently applied principle that claims of ineffective assistance of counsel that can be adjudicated based on facts of record must be presented on direct appeal while such claims that are dependent on material facts dehors the record may be presented in a postconviction petition.

Similarly, in *State v. Decker*, 28 Ohio St.3d 137, 139-40 (1986), the court consistently applied *Perry* and *Cole* to ineffective assistance of trial counsel claims. The petitioner attempted to raise an ineffective assistance claim on direct appeal based on his attorney's failure to raise an insanity defense. He then filed a postconviction action again pleading he was denied the effective assistance of trial counsel based on evidence not of record on direct appeal. The trial court held an evidentiary

hearing. Relying *both* on evidence of record *and* the testimony of his trial attorney during the postconviction hearing, the Supreme Court of Ohio held that the petitioner was not denied the effective assistance of counsel. 28 Ohio St.3d at 140.

Petitioner also argues that this Court should not impose a procedural bar for claims based on evidence of record because Ohio's postconviction system does not meet the requirements of due process. Petitioner apparently is claiming that Ohio's postconviction system is so erratic in its decision-making that a determination on postconviction that a claim is procedurally barred is entitled to no weight in federal court. Petitioner offers absolutely no persuasive evidentiary or other support for that proposition.

Easter v. Endell, 37 F.3d 1343, 1345-46 (8th Cir. 1994), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1322 (1997), stands for the proposition that federal courts will not enforce a procedural bar when the petitioner had no reasonable basis to know about the availability of the state court remedy. Petitioner cannot reasonably contend that he was unaware of the availability of state court remedies.

Similarly, *Harmon v. Ryan*, 959 F.2d 1457, 1461-63 (9th Cir. 1992), involved a pronouncement by the Arizona Supreme Court that reasonably led litigants to believe that a direct appeal to the State's intermediate appellate court fully exhausted the State's judicial remedies. Later, the Arizona Supreme Court held that failure to pursue a discretionary appeal to that Court waived the claims not presented and barred federal habeas review. The Court of Appeals for the Ninth Circuit held that the petitioner had exhausted his Arizona remedies and refused to enforce the State's procedural

bar. No Supreme Court of Ohio decision misled Petitioner here.

Petitioner also suggests that this court should not hold that his ineffective assistance of trial counsel claims are procedurally barred. This argument lacks merit. Ohio does provide a remedy for ineffective assistance of trial counsel claims based on evidence *dehors* the record: postconviction relief. O.R.C. §2953.21. It merely demands that ineffective assistance of counsel claims based on facts of record be presented on direct appeal when the defendant is represented by new counsel on direct appeal. The cases cited by petitioner are not to the contrary.

In *United States v. August*, 984 F.2d 705, 711 (6th Cir. 1992), *cert. denied*, 510 U.S. 854 (1993), the United States Court of Appeals for the Sixth Circuit held that convicted federal criminal defendants should, as a general rule, present ineffective assistance of trial counsel claims in a postconviction proceeding under 28 U.S.C. §2255. Nonetheless, the court recognized that when the record is adequate to assess the merits of an ineffective assistance claim, at least some courts consider it on direct appeal. *Id.* The court, finding that the record on direct appeal in the case before it was inadequate to resolve defendant's ineffective assistance of trial counsel claims, declined to review the alleged error. *Id. Accord, United States v. Wilson*, 27 F.3d 1126, 1133 (6th Cir. 1994), *cert. denied*, 513 U.S. 976 (1994). Here, the Ohio courts have determined that the record on direct appeal was adequate to review most of Petitioner's ineffective assistance of trial counsel claims.

The United States Court of Appeals for the Tenth Circuit held in *Breechen v. Reynolds*, 41 F.3d at 1363-64, that generally federal courts should not enforce procedural bars based on a failure to present ineffective

assistance of trial counsel claims on direct appeal because the petitioner needs "a meaningful opportunity to assess and develop a claim of ineffective assistance of counsel" and often needs "an opportunity to develop additional facts . . . ." The court found that, although the petitioner had been represented by new counsel on direct appeal, he "did not have an opportunity to develop any additional facts relating to trial counsel's performance in the direct review process since evidentiary hearings are unavailable at the appellate level." 41 F.3d at 1364. Apparently believing the petitioner's claim was based, at least in substantial part, on facts not of record on direct appeal, the court refused to enforce the procedural bar imposed by the Oklahoma Court of Criminal Appeals.

Ohio, however, distinguishes between claims dependent solely on facts of record and those requiring evidence *dehors* the record for adjudication. Ohio imposes a procedural bar only as to those ineffective assistance of trial counsel claims that rest on facts of record that could have been determined on direct appeal. Nothing in *Breechen* precludes a state adopting that flexible approach and a federal court enforcing any resulting procedural bar.

If a defendant fails to present his federal claim to the state court in the manner required by a long-standing state procedural rule and the final state court addressing the claim holds that further consideration of the claim is precluded because of the defendant's procedural default, then a district court cannot consider the merits of the claim absent a showing of cause for the state procedural default and prejudice resulting from the constitutional error asserted. *Wainwright v. Sykes*, 433 U.S. at 86-87. Petitioner asserts only one colorable basis for a finding of cause: ineffective assistance of counsel. Petitioner contends that his counsel's incompetence resulted in the

apparent waiver of the claims raised for the first time after the completion of his direct appeals.

g. Trial and appellate counsel were responsible for the procedural default

Petitioner asserts that his trial and appellate counsel were responsible for any procedural defaults resulting from the Ohio courts finding a violation of the Perry rule. Petitioner does not set out claim-by-claim how the alleged ineffective assistance of counsel establishes cause for his failure to allege each of the procedurally barred claims on direct appeal.

When ineffective assistance of counsel is asserted as cause, the claim of ineffective assistance of counsel must have been first presented to and adjudicated by the state courts. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986); *Ewing v. McMackin*, 799 F.2d 1143, 1149-50 (6th Cir. 1986). Here, Petitioner presented ineffective assistance of counsel claims to the Ohio courts on direct appeal, and those claims were rejected as a basis for reversal of Petitioner's convictions and sentences.

The standard for determining whether a defendant has been denied the effective assistance of counsel is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to

> deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Petitioner asserts claims based upon alleged ineffective assistance of counsel during the culpability phase of his trial. Petitioner cannot establish cause for failing to raise the claims the Ohio courts held were procedurally barred for failure to present them on direct appeal. Moreover, a review of the trial transcript demonstrates that Petitioner's counsel's performance was well within the range of reasonable professional assistance in the culpability phase of a death penalty case. The evidence of Petitioner's guilt was overwhelming. None of the claims of ineffective assistance of counsel would, even if the Court were to assume an act of attorney neglect or failure to make an available objection were established, have had the effect of denying petitioner a fair trial and an accurate result. The alleged ineffective assistance of trial counsel during the culpability phase of the trial does not establish cause for Petitioner's failure to raise the procedurally barred claims on direct appeal.

Petitioner also contends that he received ineffective assistance from his counsel during the penalty phase of the trial. The Court concludes, however, as is set forth in greater detail below, that the alleged errors of counsel do not amount to cause. Counsel acted within the reasonable range of competence for defense counsel in death penalty cases given the circumstances of Petitioner's case. As the Ohio Court of Appeals held, defense counsel presented the mitigation case competently. Defense counsel presented reasonable arguments in mitigation and supported his arguments with references to the evidence. Defense counsel's performance did not fall below the minimum standards of

professional conduct and did not deprive petitioner of a fundamentally fair mitigation phase trial.

The evidence related to mitigation that Petitioner contends a reasonably competent attorney would have developed and presented would have been relevant to the mitigation analysis. None of that evidence supports a compelling mitigation theory that was not presented by trial counsel, however. Either the evidence is cumulative of evidence that was considered or it supports a theory that this Court does not find sufficiently compelling to convince the Court that trial counsel's failure to develop and present the evidence resulted in a penalty phase determination that was fundamentally unfair. None of the information weighs heavily against the aggravating factors proved beyond a reasonable doubt by the prosecution. Trial counsel's shortcomings, if any, regarding the presentation of evidence at the penalty phase do not amount to cause for failing to timely raise issues on direct appeal.

Petitioner also alleges ineffective assistance of appellate counsel. The Ohio Court of Appeals held that these claims were waived and barred from further review by Petitioner's failure to move for reconsideration in the Court of Appeals within ninety days of the denial of his direct appeal. To the extent that Petitioner asserts that the ineffective assistance of his appellate counsel amounts to cause for his failure to raise the procedurally barred claims on direct appeal, the Court will review the claim of ineffective assistance of appellate counsel.

Counsel raised sixteen alleged errors on direct appeal. To be effective, attorneys representing convicted criminal defendants on direct appeal must focus their arguments. The assertion of too many assignments of error greatly increases the possibility that potentially meritorious claims will be given less consideration than

they are due by counsel in briefing and argument as well as by the appellate court during its review. None of the alleged errors not presented on appeal is demonstrably stronger than the weakest of the arguments actually presented to the Ohio Court of Appeals. Indeed, this Court concludes that Petitioner's appellate counsel presented the strongest claims on direct appeal.

Even if some of the omitted alleged errors were reasonably arguable, appellate counsel provided Petitioner with reasonably competent representation when they exercised their professional judgment to make the choices concerning which errors to argue. Appellate counsel's alleged ineffectiveness did not operate to deprive Petitioner of a fundamentally fair appeal. The Court concludes, therefore, that Petitioner's allegations of ineffective assistance of counsel fail to establish cause for his failure to present his procedurally barred claims to the Ohio courts on direct appeal.

h. Inadequacy of Ohio's postconviction system

Petitioner also maintains that Ohio's postconviction system gives defendants an inadequate opportunity to discover, present, and have constitutional claims decided. This argument lacks merit. The claims that the state courts have determined are procedurally barred are barred because they were not presented to the Ohio courts on direct appeal. Cause relates solely to an explanation of why Petitioner failed to present these claims on direct appeal. Alleged deficiencies in Ohio's postconviction system have no relevance to Petitioner's failure to raise the claims on direct appeal.

i. Petitioner is prejudiced by imposition of the bar

Petitioner also maintains that he is able to demonstrate prejudice resulting from the imposition of the procedural bar. The case law provides no precise definition of "prejudice." *United States v. Frady*, 456 U.S. 152, 168 (1982). Petitioner has the burden of proving *actual* prejudice, not the mere *possibility* that the error so infected the entire trial as to deny him due process. *Frady*, 456 U.S. at 170; *Maupin v. Smith,* 785 F.2d 135, 139 (6th Cir. 1986). Petitioner must identify a "risk of a fundamental miscarriage of justice." *Frady*, 456 U.S. at 172.

Petitioner argues that prejudice is established by the general unreliability of the trial and review process in his capital case. He asserts that the numerous constitutional errors that occurred cannot be deemed constitutionally harmless. He concludes that under the totality of the circumstances the Court should find prejudice to him.

Even were the Court to assume cause for Petitioner's failing to timely present one or more of the procedurally barred claims to the Ohio courts, Petitioner has failed to demonstrate resulting prejudice. None of the alleged errors, if proven, rendered Petitioner's trial fundamentally unfair.

Even though a petitioner fails to demonstrate cause for his procedural default, he may obtain federal habeas review if he can demonstrate a "fundamental miscarriage of justice." A petitioner must demonstrate that a specific constitutional violation has probably resulted in the conviction of someone who is actually innocent of the charged offense. *Schlup v. Delo*, 513 U.S. 298, 326-32 (1995); *Murray v. Carrier*, 477 U.S. 478, 495-

96 (1986); *Rust v. Zent*, 17 F.3d 155, 162 (6th Cir. 1994); *Olsen v. McFaul*, 843 F.2d 918, 932 (6th Cir. 1988); *Ferguson v. Knight*, 809 F.2d 1239, 1242 (6th Cir. 1987)(per curiam); *Ewing v. McMackin*, 799 F.2d 1143, 1152 (6th Cir. 1986).

"Innocence" focusses on reasonable doubt. Establishing actual innocence requires more than "showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists . . ., rather . . . a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup v. Delo*, 513 U.S. at 329. The state procedural bar should be enforced if there is "any juror who, acting reasonably, would find the petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 333 (O'Connor, J., concurring).

The existence of a meritorious constitutional claim without any *new evidence* of innocence is "not . . . sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." *Schlup v. Delo*, 513 U.S. at 316. A petitioner challenging imposition of the death penalty (as opposed to his conviction for murder) must prove by clear and convincing evidence that no reasonable juror would have found the petitioner eligible for the death penalty. (1992). *See also Schlup v. Delo*, 513 U.S. at 323; *O'Guinn v. Dutton*, 42 F.3d 331, 346-47 (6th Cir. 1994).

Here, Petitioner's claim of actual innocence is not colorable. As the Supreme Court of Ohio detailed in its decision, the evidence of Petitioner's guilt is substantial. *State v. Combs*, 62 Ohio St.3d at 293-94. Indeed, no question at all exists as to Petitioner's identity as the murderer of Peggy and Joan Schoonover. The sole

question argued by Petitioner is his "guilt" with respect to the element of purpose and/or prior calculation.

In this case, substantial evidence in the record supports the jury's finding with regard to the specifications. Petitioner Combs would have the Court conclude that he has a claim of actual innocence based upon his intoxication. The jury did not accept Petitioner's contention, though evidence of his intoxication was presented to the jury. The Court also concludes that the evidence Petitioner has identified in support of his contention does not negate the evidence in support of the specifications. The Court concludes that reasonable jurors could well have determined that Petitioner was eligible for the death penalty. *See Sawyer v. Whitley*, 505 U.S. at 352.

2. The Court's Analysis Concerning the Claims not Presented to the Ohio Courts on Direct Appeal

The Court will review each individual claim Respondent maintains is procedurally barred. The Claims are set forth above as they appear in the Amended Petition. The Court will set out the procedural history of the claim in the Ohio courts. If the claim was not presented to the Ohio courts on direct appeal, the Court will conduct a "cause" and "prejudice" analysis. If it was presented to the Ohio courts, this Court will proceed to rule on the merits of the claim.

a. First Claim for Relief. **The trial court improperly limited defense counsel questions to potential jurors.**

This claim was not presented to the Ohio courts on direct appeal. Petitioner raised the claim postconviction

in the Hamilton County Court of Common Pleas, which concluded that the claim was barred by *res judicata* because it could have been raised at trial and on direct appeal.

Petitioner Combs argues that cause for his failure to raise this claim on direct appeal is established by virtue of the ineffectiveness of his counsel. The Court has previously addressed, and rejected, that assertion. In any event, the Court concludes that Petitioner cannot establish prejudice because he cannot demonstrate that a genuine risk of a fundamental miscarriage of justice resulted from the trial court's limitation of trial counsel's questions to prospective jurors.

b. Second Claim for Relief. **The trial court improperly permitted jurors to be informed that conviction on a death penalty specification was necessary to reach sentencing.**

This claim was not raised on direct appeal or postconviction. Petitioner Combs' arguments concerning cause are based, once again, upon the ineffectiveness of his counsel. As the Court has concluded, Plaintiff's ineffectiveness claim does not establish cause in this case. Prejudice is also not established, inasmuch as Petitioner cannot demonstrate that the asserted error so infected the proceedings that a genuine risk of a fundamental miscarriage of justice resulted. Moreover, ineffectiveness of counsel does not excuse the waiver resulting from Petitioner's failure to raise the claim in the state courts postconviction.

c. Third Claim for Relief. **The trial court erred by prohibiting voir dire on the offense of voluntary manslaughter.**

This claim was not raised on direct appeal or postconviction in the state courts. Petitioner Combs' cause argument, based upon the alleged ineffectiveness of his counsel, is unavailing. Moreover, the Court concludes that Petitioner cannot demonstrate that he was prejudiced by the asserted error by the trial court because he has not demonstrated that the asserted error resulted in a genuine risk of a fundamental miscarriage of justice. Moreover, Petitioner's arguments based upon the ineffectiveness of his counsel do not excuse his failure to raise the claim in the state courts postconviction.

d. Sixth Claim for Relief. **The trial court improperly excluded Dr. Fisher's testimony that a victim had previously pulled a gun on Petitioner.**

This claim was not raised on direct appeal. Petitioner Combs asserted the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because the claim could have been raised on direct appeal.

Petitioner's argument in support of a finding of cause for his failure to assert this claim on direct appeal is based upon the alleged ineffectiveness of counsel. Because trial counsel did object to the exclusion of this evidence at trial, the cause finding could only be premised upon the ineffectiveness of appellate counsel. As the Court has previously concluded, appellate counsel was not constitutionally ineffective.

Even were Petitioner able to establish cause based upon the ineffectiveness of his appellate counsel, he cannot demonstrate that he was prejudiced as a result of the imposition of the procedural bar with regard to this claim. Petitioner argues, feebly, that the evidence would have negated the jury's findings with regard to purpose and prior calculation and design. That argument is utterly nonsensical.

e. Seventh Claim for Relief. **The trial court improperly allowed inadmissible and prejudicial testimony from Dr. Fisher.**

This claim was not raised on direct appeal. Petitioner Combs asserted the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner's argument in support of a cause finding is that his counsel was constitutionally ineffective. The Court again assumes that Petitioner bases his contention on the performance of appellate counsel, inasmuch as trial counsel raised an objection to the testimony in question at trial.

As the Court has previously concluded, Petitioner's appellate counsel's performance was not constitutionally defective. The Court concludes that a cause finding cannot be based upon the performance of appellate counsel.

In any event, the Court concludes that Petitioner cannot establish prejudice, inasmuch as he cannot demonstrate that a genuine risk of a fundamental

miscarriage of justice resulted from the admission of Dr. Fisher's testimony. The testimony itself was certainly prejudicial to Petitioner, but Petitioner cannot demonstrate that the testimony was inadmissible. Accordingly, Petitioner cannot establish that the result of his direct appeal would have been different had the claim been raised by appellate counsel.

f. Eighth Claim for Relief. **The trial court impermissibly shifted the burden of proof as to the intoxication issue.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner Combs bases his argument in support of a cause finding on the ineffective assistance of his counsel. The Court has rejected that argument. The Court further concludes that, even were Petitioner able to establish cause based upon his counsel's performance, he cannot demonstrate prejudice.

Petitioner's claim is based upon a misinterpretation of the trial court's instructions. The trial court, in instructing the jury concerning the defense of intoxication, discussed Petitioner's mental state. Petitioner Combs contends that, in so doing, the trial court shifted the burden of proof with respect to the mental element of the offenses to Petitioner. That argument is based upon a contortion of the instructions, which, when considered as a whole, are not infirm.

g. Ninth Claim for Relief. **The trial court impermissibly instructed the jury on reasonable doubt.**

This claim was not raised on direct appeal. Petitioner Combs raised this claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner's cause argument, based upon the ineffectiveness of trial counsel, is unavailing. Moreover, his assertion of prejudice fails because Petitioner cannot establish that a genuine risk of a fundamental miscarriage of justice resulted from the instruction to which he objects. Petitioner's arguments establish only that he believes that a more stringent burden of proof ought to apply in capital cases. They do not establish that the instruction that was given was constitutionally infirm. Accordingly, even were Petitioner able to demonstrate cause with respect to this asserted error, he cannot establish prejudice.

h. Eleventh Claim for Relief. **The trial court erroneously instructed the jury on causation.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner Combs contends that cause is established by the ineffectiveness of his trial and appellate counsel and that he was prejudiced as a result

of the allegedly erroneous instruction. The Court concludes that, even were Petitioner to succeed in demonstrating cause on the basis of his counsel's performance, he cannot establish that a genuine risk of a fundamental miscarriage of justice resulted from the instruction in question.

Petitioner contends that the instruction the trial court gave was faulty because it did not inform the jury that a finding of causation must be based upon specific intent to kill the actual victims of the offenses. Petitioner's prejudice argument is baseless, inasmuch as the evidence of record would not have permitted a finding that Petitioner intended to kill or injure anyone other than the victims of his offenses. Accordingly, when considered in light of the evidence presented in Petitioner's trial, any infirmity in the instruction was not prejudicial.

i. Fourteenth Claim for Relief. **The trial court improperly defined "mitigat actors."**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

In support of a finding of cause, Petitioner asserts his counsel's ineffectiveness. As the Court has previously observed, cause is not established by virtue of an attorney's decision not to raise every arguable claim on direct appeal. Indeed, where counsel has raised some colorable claims and omitted others, the Court presumes that the omission has been the result of the exercise of professional judgment, rather than of ineffectiveness or

incompetence. That presumption is not rebutted in Petitioner's case, inasmuch as Petitioner's counsel on direct appeal presented several colorable claims and the weakest of those claims appears to this Court to be arguably stronger than any of the omitted claims.

Petitioner's prejudice argument is also meritless. Petitioner contends that the trial court's instruction left the jury with the impression that a mitigating factor that does not excuse a crime may not be considered. Petitioner further contends that the instruction denied him the benefit of mitigation evidence that might otherwise have supported a life sentence.

The Court is not persuaded that the instruction, when considered in its entirety, supports a prejudice finding. The trial court instructed the jury that mitigating factors "do not justify or excuse the crime of aggravated murder." Transcript, pp.1434-35. The trial court's use of the word "excusing" later in the instruction, however unfortunate, did not render the instruction constitutionally infirm. In short, the Court is not persuaded that a genuine risk of a fundamental miscarriage of justice was occasioned by the contested instruction.

j. Fifteenth Claim for Relief. **The trial court improperly defined "outweigh."**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner again contends that cause for his failure to raise the claim on direct appeal is established by virtue of the ineffectiveness of his appellate counsel. The Court rejects that contention for the reasons set forth elsewhere in this Opinion and Order.

The Court further concludes that Petitioner has not demonstrated that the instruction gave rise to a genuine risk of a fundamental miscarriage of justice. Petitioner's objection to the instruction given by the trial court is that it is vague and provided insufficient guidance to the jury. Having failed to demonstrate a specific infirmity in the instruction, Petitioner has failed to establish that he was prejudiced.

k. Seventeenth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during voir dire of prospective jurors by waiving Petitioner's final two peremptory challenges.**

This claim was not raised on direct appeal or postconviction before the courts of Ohio. Petitioner contends that ineffectiveness of counsel provides cause for the failure to raise the claim on direct appeal. Specifically, Petitioner contends that Mr. Stidham, who was trial counsel, could not have been expected to raise claims of his own ineffectiveness on direct appeal.

As the Court has previously noted, Petitioner's claim of ineffectiveness of appellate counsel is meritless. Petitioner's specific contention based upon Mr. Stidham's participation in the appeal is without support. Mr. Stidham was not Petitioner's only attorney on direct appeal. Indeed, Petitioner was also represented by Mr.

Hoeffle, who did not participate in the trial. Petitioner has not articulated a basis for a conclusion that Mr. Hoeffle could not have raised claims of Mr. Stidham's ineffectiveness. Indeed, such claims were raised with regard to other asserted omissions by trial counsel. Accordingly, the Court concludes that Petitioner has not demonstrated cause for his failure to raise the claim on direct appeal.

Petitioner's arguments with regard to prejudice are equally unavailing. Petitioner contends that he was deprived of a fair and impartial jury and that he waived his right to challenge venue by virtue of his counsel's failure to exercise his final two peremptory challenges. Petitioner has not demonstrated, however, that he was, in fact, prejudiced by counsel's actions. Petitioner has not articulated a basis for a conclusion that a change of venue would have been granted or that Petitioner could have raised a compelling argument for a change of venue. Moreover, Petitioner has not made a cogent argument in support of a conclusion that he was deprived of a fair and impartial jury. The Court concludes that Petitioner cannot demonstrate prejudice, even if he were able to establish cause for his failure to raise this claim on direct appeal.

l. Eighteenth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during voir dire of prospective jurors by failing to object to errors.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res*

judicata because it could have been raised on direct appeal.

Petitioner's arguments in support of a finding of cause are those rejected by the Court in the preceding sections of this Opinion and Order. For the reasons set forth there, the Court again concludes that Petitioner has not demonstrated cause for his failure to raise this claim on direct appeal.

Without discussing at length Petitioner's specific assertions in support of this claim, the Court concludes that none of the asserted errors gave rise to a genuine risk of a fundamental miscarriage of justice. Indeed, the Court concludes that Petitioner has not identified a misstatement by either the trial court or the prosecution that was not cured in the Court's instructions to the jury. The Court concludes that Petitioner has not established prejudice.

m. Nineteenth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during voir dire of prospective jurors by failing to adequately examine prospective jurors.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner again argues that cause for his failure to raise this claim on direct appeal is established by virtue of

his appellate counsel's ineffectiveness, a contention that the Court has rejected, and by virtue of Mr. Stidham's participation at the trial and appellate phases, a second contention that the Court has rejected. The Court concludes that Petitioner has not demonstrated cause.

Petitioner has also failed to demonstrate a resulting prejudice. Petitioner has not demonstrated, or raised a colorable claim, that he was deprived of a fair and impartial jury. Accordingly, he cannot base a claim of prejudice upon any act or omission of counsel in the jury selection process.

n. Twentieth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by repeatedly conceding Petitioner's guilt.**

This claim was not raised on direct appeal or postconviction before the courts of Ohio. Petitioner bases his arguments regarding cause upon the asserted ineffectiveness of his appellate counsel. The Court concludes that those arguments are without merit.

Petitioner's prejudice argument is nonsensical in light of the evidence presented at trial. That evidence left absolutely no room for doubt concerning Petitioner's guilt with respect to the murders of Peggy and Joan Schoonover. Petitioner's counsel clearly did not concede that Petitioner was guilty of aggravated murder, as Petitioner contends. Indeed, Mr. Stidham argued that Petitioner "is going to be asking that you return not guilty verdicts on both counts of aggravated murder." Transcript, pp.915-16. Counsel's asserted concessions did not give rise to a genuine risk of a fundamental

miscarriage of justice when considered in light of the evidence presented at trial, which established beyond a doubt that Petitioner murdered Peggy and Joan Schoonover.

o. Twenty-Second Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to testimony in which Petitioner referred to himself as "Doc Holliday."**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner's arguments in support of a finding of cause are again based upon the asserted ineffectiveness of appellate counsel. The Court rejects those arguments and concludes that Petitioner has not demonstrated cause for his failure to raise the claim on direct appeal.

The Court is equally unconvinced by Petitioner's prejudice arguments. Petitioner has not articulated the manner in which the admission of testimony concerning Petitioner's reference to himself as "Doc Holliday" was prejudicial to him. Even if the reference was misinterpreted by the jury, Petitioner has not articulated a basis for a conclusion that the outcome of his trial would have been affected in any way by the exclusion of the testimony.

p. Twenty-Fourth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to or introduce evidence of alcohol containers in Petitioner's car.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was based upon evidence not in the trial record. That court, nevertheless, rejected the claim based upon its conclusion that the claim did not provide a substantive ground for relief.

This Court concludes that this claim was procedurally barred. Petitioner has not articulated a cause for his failure to raise the claim on direct appeal. The claim is, in fact, based upon trial counsel's failure to object to allegedly erroneous testimony. That failure to object is in the trial record, and the basis for the objection, the alleged falsity of the testimony, was known to Petitioner and counsel at the time of trial and at the time of the direct appeal. Thus, the fact that the "correct" testimony is not in the trial record is not cause for Petitioner's failure to raise the claim on direct appeal.

The Court has previously rejected Petitioner's contention that cause is established, with respect to claims of ineffectiveness of trial counsel, by virtue of the ineffectiveness of appellate counsel and Mr. Stidham's participation in both the trial and direct appeal. The Court again rejects ineffectiveness of appellate counsel as

a cause for Petitioner's failure to raise this claim on direct appeal.

The Court further concludes that Petitioner has failed to demonstrate resulting prejudice. Petitioner contends that his ability to present his intoxication defense was hampered by the admission of incorrect testimony that alcohol containers were not found in his car after the shootings of Peggy and Joan Schoonover and by the resulting "exclusion" of evidence that such containers were indeed present. While the Court recognizes that the presence of such containers is evidence in support of a finding of intoxication, Petitioner has not demonstrated that he was prohibited from presenting an intoxication defense by virtue of the incorrect testimony concerning alcohol containers.

In fact, Petitioner adduced a significant amount of evidence of intoxication at trial. Dr. Fisher testified that he believed that Petitioner was under the influence of alcohol when he committed the murders of the Schoonover women. Others testified concerning Petitioner's alcohol consumption during the period of time leading to the murders. The prosecution did not seriously contest that Petitioner was intoxicated at the time. Accordingly, Petitioner was quite able to present an intoxication defense, even though incorrect testimony concerning the presence of alcohol containers in his car was given.

Inasmuch as he was not prevented from presenting an intoxication defense, Petitioner's prejudice argument must be based upon a contention that the jury would have accepted the defense had the correct version of events concerning the alcohol containers been presented. That contention is baseless. The evidence of intoxication actually presented to the jury, particularly in

the form of Dr. Fisher's testimony, was much more persuasive than that which was excluded.

In any event, Petitioner confuses the issue by suggesting that a finding that he was intoxicated is tantamount to an acceptance of his intoxication defense. The jury could well have concluded that Petitioner was intoxicated without accepting his defense of intoxication. The failure of trial counsel to ensure the presentation of additional evidence to support Petitioner's claim that he was intoxicated, which was never seriously denied by the prosecution, did not give rise to a genuine risk of a fundamental miscarriage of justice.

Even if the claim was not procedurally barred, the Court concludes that it lacks merit. In order to obtain the requested relief based upon a claim of ineffectiveness of counsel, Petitioner would be required to demonstrate that

(1) his "counsel's performance was deficient" or "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and

(2) "the deficient performance prejudiced the defense" in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Petitioner cannot satisfy either prong of the *Strickland* test. He cannot seriously contend that counsel's performance was constitutionally deficient when counsel did, in fact, present significant evidence of intoxication and did argue persuasively and cogently in favor of the intoxication defense. Moreover, Petitioner

cannot seriously contend that he was deprived of a trial with a reliable result when, as the Court has already noted, significant evidence of intoxication was, in fact, presented to the jury. Accordingly, to the extent that the claim is not procedurally barred, it is **DENIED** on its merits.

q. Twenty-Fifth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to file a motion for separation of witnesses.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

In support of a finding of cause for his failure to raise this claim on direct appeal, Petitioner asserts the ineffectiveness of his appellate counsel. The Court has rejected that assertion as a basis for a cause finding and concludes that Petitioner has not demonstrated that cause supports his failure.

In any event, the Court concludes that Petitioner has not demonstrated a resulting prejudice. Absent a basis for a conclusion that the failure of counsel to seek a separation of witnesses resulted in a genuine risk of a fundamental miscarriage of justice, the Court will not assume that Petitioner was prejudiced by the failure.

r. Twenty-Sixth Claim for Relief. **Petitioner Combs' trial counsel breached their duty of pretrial investigation by failing to obtain a drug and alcohol expert.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner's argument in support of a cause finding is based upon the asserted ineffectiveness of his appellate counsel. For reasons previously stated, the Court concludes that appellate counsel's performance does not establish cause for Petitioner's failure to raise this claim on direct appeal.

The Court further concludes that Petitioner has not established that prejudice resulted. In support of this and the two following Claims for Relief, Petitioner contends that effective counsel would have secured experts to testify on Petitioner's behalf, either in support of an intoxication defense or in mitigation. The Court does not conclude that counsel's failure to secure the testimony of such experts gave rise to a genuine risk of a fundamental miscarriage of justice.

As the Court has previously noted, Petitioner was able to present significant evidence in support of his intoxication defense. Indeed, the evidence that Petitioner was intoxicated at the time he committed the murders of Peggy and Joan Schoonover is quite persuasive and may well have been credited by the jury. Petitioner has not established, however, the manner in which the testimony of an additional expert would have been beneficial to

Petitioner or allowed him to convince the jury that his intoxication prevented him from committing *aggravated* murder.

Petitioner contends that the expert would have shed light on Petitioner's condition on the day of the murders. As the Court has noted, however, ample evidence of Petitioner's condition on that day was presented to the jury and did not convince the jury that Petitioner's intoxication defense was meritorious. The Court concludes that Petitioner cannot demonstrate prejudice, even were he able to establish cause for his failure to raise this claim on direct appeal.

s. Twenty-Seventh Claim for Relief. **Petitioner Combs' trial counsel breached their duty of pretrial investigation by failing to obtain a psychological expert.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Once again, the Court rejects Petitioner's contention that his appellate counsel's ineffectiveness provides cause for his failure to raise this claim on direct appeal. The Court further concludes that Petitioner has not demonstrated that prejudice resulted from the failure.

Petitioner contends that the jury was left with no reason to spare his life because no psychological expert testified concerning Petitioner's family background, academic and learning experiences, work history, relationships, sexual and marital functioning, early

development experiences, physical health, psychological functioning, and environmental stressors. While the Court is, of course, unable to determine what impact the presentation of such evidence would have had upon the outcome of Petitioner's trial, the record demonstrates that Petitioner was not prevented from presenting arguments and evidence in support of mitigation. Indeed, a cogent mitigation case was made by Petitioner's counsel. The selection of a mitigation strategy was entrusted to Petitioner's trial counsel, who selected a reasonable, albeit unsuccessful, approach to mitigation. Petitioner was not deprived of his right to present arguments and evidence in support of mitigation.

t. Twenty-Eighth Claim for Relief. **Petitioner Combs' trial counsel breached their duty of pretrial investigation by failing to obtain a cultural expert.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

For reasons set forth in preceding sections of this Opinion and Order, the Court rejects Petitioner's contention that his appellate counsel's ineffectiveness provides cause for his failure to raise this claim on direct appeal. The Court also concludes that Petitioner has not demonstrated that prejudice resulted from the failure.

The claim is based upon trial counsel's failure to secure an expert on Appalachian culture. Petitioner contends that such an expert could have explained certain aspects of Petitioner's behavior to the jury. For the

reasons set forth in the preceding subsection of this Opinion and Order, the Court concludes that Plaintiff has not established that trial counsel's failure to present the testimony of an additional expert gave rise to a genuine risk of a *fundamental miscarriage of justice*.

u. Twenty-Ninth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to file all necessary and appropriate motions.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner contends that the ineffectiveness of his appellate counsel and the participation of Mr. Stidham as counsel at trial and on direct appeal are cause for his failure to raise this claim on direct appeal. The Court has previously rejected Petitioner's cause argument and again concludes that the failure to raise this claim on direct appeal is not supported by cause.

As the Court has previously observed, the only specific motion that Petitioner contends would have been filed by effective counsel is a motion for the suppression of the statements Petitioner made to nurse Leigh Ann Wright. As will be set forth in greater detail below, Petitioner cannot establish that a motion to suppress those statements would have been meritorious.

Accordingly, he cannot establish prejudice on the basis of trial counsel's failure to move for their suppression.

v. Thirtieth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to the trial court's improper jury instructions.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

As the Court has stated, Petitioner contends that the ineffectiveness of his appellate counsel and the participation of Mr. Stidham as counsel at trial and on direct appeal are cause for his failure to raise this claim on direct appeal. The Court rejects Petitioner's cause argument and again concludes that the failure to raise this claim on direct appeal is not supported by cause.

The Court further concludes that Petitioner has not established that prejudice resulted from trial counsel's failure to object to the instructions in question. In particular, Petitioner addresses his arguments to the trial court's definition of "reasonable doubt," that court's instruction concerning intoxication and the related burden of proof, and the instruction on "cause." Having examined those instructions, the Court concludes Petitioner cannot establish that trial counsel's failure to object gave rise to a genuine risk of a fundamental miscarriage of justice. Indeed, Petitioner cannot

demonstrate that an objection would have been sustained or, indeed, meritorious. The Court observes that none of the instructions is sufficiently infirm to raise a concern that a miscarriage of justice could have resulted from counsel's failure to object. Accordingly, Petitioner has failed to demonstrate cause or prejudice.

w. Thirty-First Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to redact irrelevant testimony.**

This claim was not raised on direct appeal or postconviction before the courts of Ohio. Petitioner's cause arguments based upon the asserted ineffectiveness of appellate counsel are not meritorious, as the Court has previously concluded. The Court also concludes that Petitioner has not established that prejudice resulted from the asserted failure of trial counsel.

Petitioner addresses his arguments in support of this claim to testimony from the videotaped deposition of Tony Liming that Petitioner "stole stuff" from the witness' mother. Petitioner cannot demonstrate that the admission of that testimony gave rise to a genuine risk of a fundamental miscarriage of justice.

To support his prejudice contention, Petitioner would be required to convince the Court that the admission of Mr. Liming's statement could have resulted in his being convicted of a crime of which he was not guilty. The evidence of record does not leave any doubt that Petitioner murdered Peggy and Joan Schoonover. Furthermore, the statement of Mr. Liming did not have any bearing upon the aggravating circumstances of

purpose and prior calculation and design. Accordingly, the admission of the statement did not have the potential for engendering a fundamental miscarriage of justice, and Petitioner has failed to establish that prejudice resulted from trial counsel's failure to move for the redaction of Mr. Liming's testimony.

x. Thirty-Second Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to request a jury instruction distinguishing between the defense of intoxication and the element of prior calculation and design.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner contends that the ineffectiveness of his appellate counsel and the participation of Mr. Stidham as counsel at trial and on direct appeal are cause for his failure to raise this claim on direct appeal. For reasons set forth above, the Court has previously rejected Petitioner's cause argument and again concludes that the failure to raise this claim on direct appeal is not supported by cause.

The Court further concludes that Petitioner has not established that he was prejudiced by the failure of trial counsel to request the instruction. Considered as a

whole, the instructions sufficiently informed the jury concerning the defense and the elements of the offenses charged to eliminate the risk of a fundamental miscarriage of justice. The confusion asserted by Petitioner is a result of his taking excerpts from the instructions and juxtaposing them in a manner in which they were not juxtaposed in the instructions as given. The Court concludes that Petitioner has failed to demonstrate cause or prejudice with respect to this claim.

y. Thirty-Third Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to improper peremptory challenges.**

This claim was not raised on direct appeal or postconviction before the courts of Ohio. Petitioner's contention that cause for his failure to raise the claim on direct appeal is established by virtue of the ineffectiveness of his appellate counsel and Mr. Stidham's participation in the trial and on direct appeal is meritless. The Court rejects that contention as set forth above.

The Court also concludes that Petitioner has not established that he was prejudiced as a result of the asserted failure of his trial counsel. Other than the bald allegation of prejudice, Petitioner has not identified the manner in which he believes the prosecution's use of its peremptory challenges gave rise to a genuine risk of a fundamental miscarriage of justice. While a claim of prejudice could certainly be based upon a jury selection procedure in which potentially sympathetic jurors are struck and those empaneled have voiced unequivocally that they are strongly in favor of, and desirous of imposing, the death penalty, those facts do not obtain in

Petitioner's case. The jurors who were finally seated did not express any state of mind stronger than a willingness to consider the evidence and the trial court's instructions and to decide the matter accordingly. As such, Petitioner cannot establish that the prosecution's use of its peremptory challenges created a risk that an unfair and partial jury would be seated, and Petitioner cannot establish prejudice.

z. Thirty-Fourth Claim for Relief. **Petitioner Combs' trial attorneys provided grossly ineffective and inadequate representation during the trial's sentencing phase by failing to object to numerous improper comments by the prosecution.**

As the Court has previously observed, the heading for Petitioner's Thirty-Fourth Claim for Relief includes reference to improper comments by the prosecution. The argument in support of the claim includes no references to comments by the prosecution and, instead, addresses various instructions given by the trial court. Petitioner contends that his trial counsel was ineffective for failing to object to the trial court's definition of "outweigh," the court's definition of "mitigating factors," the court's reasonable doubt instruction, the court's instruction concerning sympathy, and the court's instruction including all of the statutory mitigating factors.

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

The Court again rejects Petitioner's contention that the ineffectiveness of his appellate counsel and the participation of Mr. Stidham as counsel at trial and on direct appeal are cause for his failure to raise this claim on direct appeal. The Court further concludes that Petitioner has not established that he was prejudiced by the failure of trial counsel to object to the trial court's instructions.

In addressing Petitioner's Fifteenth Claim for Relief, the Court concluded that Petitioner had not identified a specific infirmity in the instruction and that Petitioner was not prejudiced by the instruction. The Court concludes that Petitioner has also failed to demonstrate that his counsel's failure to object to the instruction gave rise to a genuine risk of a fundamental miscarriage of justice, in light of the fact that the instruction provided the jury with sufficient guidance with respect to the meaning of the word, "outweigh." For the same reason, the Court concludes that Petitioner cannot demonstrate that prejudice resulted from the trial court's definition of "mitigating factors" or the Court's instruction concerning reasonable doubt. *See* the Court's analysis concerning Petitioner's Fourteenth and Thirtieth Claims for Relief, above.

As regards Petitioner's contention that he was prejudiced by the trial court's instruction concerning sympathy and by that court's inclusion of all of the statutory mitigating circumstances in its penalty phase instructions, for reasons set forth fully below, the Court concludes that neither of the instructions in question violated a constitutional right of Petitioner. The Court further concludes that neither instruction gave rise to a genuine risk of a fundamental miscarriage of justice, inasmuch as they adequately advised the jury concerning the legal standards to be applied in its deliberations.

aa. Thirty-Fifth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's sentencing phase by failing to investigate and utilize mitigating factors.**

This claim was not raised on direct appeal or postconviction before the courts of Ohio. Petitioner contends that the ineffectiveness of his appellate counsel was cause for his failure to raise the claim on direct appeal. For the reasons set forth above, the Court concludes that Petitioner has not established cause. The Court further concludes that Petitioner has not established prejudice resulting from the asserted failure.

As the Court has previously concluded, Petitioner cannot demonstrate prejudice with respect to his counsel's sentencing phase presentation. Counsel presented a cogent argument for mitigation supported by evidence. Petitioner now attacks the decisions made by trial counsel in making that presentation of evidence and arguments on the theory that other, or additional, evidence and arguments would have been more successful. The Court does not conclude, however, that counsel's decisions with regard to the sentencing phase gave rise to a genuine risk of a fundamental miscarriage of justice. Petitioner was afforded the statutorily required opportunity to present a mitigation case, and his counsel seized that opportunity. Accordingly, even if Petitioner were able to establish cause for his failure to present this claim on direct appeal, he cannot demonstrate resulting prejudice.

bb. Thirty-Sixth Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's sentencing phase by failing to request a penalty phase instruction distinguishing "excuse" and "mitigation."**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner contends that the ineffectiveness of his appellate counsel and the participation of Mr. Stidham as counsel at trial and on direct appeal are cause for his failure to raise this claim on direct appeal. As previously stated, the Court rejects Petitioner's cause argument and again concludes that the failure to raise this claim on direct appeal is not supported by cause.

The Court further concludes that Petitioner has not established that he was prejudiced by the failure of trial counsel to request the instruction. Considered as a whole, the instructions sufficiently informed the jury concerning the meaning of the term, "mitigation," as used in the sentencing phase instructions. The Court does not perceive an infirmity in the instructions, as given, that would have given rise to a genuine risk of a fundamental miscarriage of justice. Any improvident word choice by the trial court or prosecution did not deprive the jury of a clear understanding of its duty with respect to mitigation and sentencing. Accordingly, even were Petitioner able to

establish cause for his failure to raise this claim on direct appeal, he has not demonstrated a resulting prejudice.

cc. Thirty-Seventh Claim for Relief. **Petitioner's constitutional rights were violated by the appellate court's erroneous determination that the jury, absent the numerous trial errors, would still have imposed death.**

Petitioner could not have raised this claim on direct appeal to the Court of Appeals for Hamilton County. The claim could have been raised on direct appeal to the Ohio Supreme Court, however, and was not. Petitioner has not established cause for his failure to raise the claim at that stage of the proceedings; therefore, it is waived, and Petitioner may not present it to this Court absent a demonstration of cause and prejudice. *See Harris v. Reed*, 489 U.S. 255, 269 (1989)(O'Connor, J., concurring); *Leroy v. Morris*, 757 F.2d 94, 100 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985); *Brown v. Marshall*, 704 F.2d 333, 334-35 (6th Cir.), *cert. denied*, 464 U.S. 835 (1983).

Petitioner has made no cogent argument in support of a conclusion that cause supports his failure to present this claim to the Ohio Supreme Court on direct appeal. With regard to prejudice, Petitioner contends that the Hamilton County Court of Appeals usurped the function of the jury in making its determination concerning the decision the jury would have made absent any trial errors. Having reviewed the decision of that court, this Court concludes that the trial court's analysis did not give rise to a genuine risk of a fundamental miscarriage of justice. The court merely concluded that any errors did not affect the jury's deliberations or verdicts, a conclusion with which this Court concurs. In

making its assessment of the impact of any errors upon the jury's verdicts, the state court of appeals performed the function that it must routinely perform in reviewing cases in which a death sentence is rendered. Petitioner's contention that the prosecution was relieved of its burden of proving guilt beyond a reasonable doubt is without support.

Petitioner would have this Court conclude that a state appellate court must always reverse a conviction and/or death sentence when any error is found to have occurred at the trial stage. Such a conclusion would fly in the face of habeas corpus jurisprudence and the principle of judicial economy. *See Clemons v. Mississippi*, 494 U.S. 738 (1990). In Petitioner's case, he has not demonstrated that any error so profoundly affected the jury's deliberations that this Court can conclude that the state appellate court's conclusion gave rise to a genuine risk of a fundamental miscarriage of justice. Accordingly, Petitioner has established neither cause nor prejudice with regard to this claim.

dd. Thirty-Eighth Claim for Relief. **Petitioner's constitutional rights were violated by the appellate court's failure to consider the cumulative effect of the trial errors.**

This claim was not raised on direct appeal to the Ohio Supreme Court. The claim was raised postconviction before the Hamilton County Court of Common Pleas, which concluded that it could not properly exercise jurisdiction over the subject matter of claims of error by the appellate courts. Petitioner then failed to raise the claim postconviction before the Court of Appeals for Hamilton County or the Ohio Supreme Court. The claim is waived, and Petitioner may not present it to this

Court absent a demonstration of cause and prejudice. *Harris v. Reed*, 489 U.S. 255, 269 (1989)(O'Connor, J., concurring); *Leroy v. Morris*, 757 F.2d 94, 100 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985); *Brown v. Marshall*, 704 F.2d 333, 334-35 (6th Cir.), *cert. denied*, 464 U.S. 835 (1983).

Petitioner has not attempted to establish cause for his failure to raise this claim on direct appeal to the Ohio Supreme Court. Accordingly, he may not present the claim to this Court.

ee. Thirty-Ninth Claim for Relief. **Petitioner Combs was deprived of effective assistance of counsel on his direct appeals.**

This claims was not raised on direct appeal to the Ohio Supreme Court. Petitioner also failed to raise the claim postconviction, but attempted to assert the issue in an application for delayed reconsideration in the First District Court of Appeals. Petitioner asserted that he was filing the application pursuant to *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

The Court of Appeals denied the application on February 22, 1994, ruling as follows:

> The within application raises a claim of ineffective assistance of appellate counsel and was brought pursuant to *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, and App.R. 26, which was amended on July 1, 1993. The application is denied because appellant has failed to show good cause for filing it more than ninety days after this Court's judgment was journalized, as required by App.R. 26(B)(2)(b).

Petitioner sought review by the Ohio Supreme Court. The Ohio Supreme Court affirmed the Court of Appeals' decision without opinion. Petitioner moved the Ohio Supreme Court for rehearing, arguing that he had been denied the procedure established in *State v. Murnahan, supra*. The Ohio Supreme Court denied the motion for rehearing, again without opinion, on August 24, 1994. On February 21, 1995, the United States Supreme Court denied Petitioner's petition for a writ of *certiorari*. *See Combs v. Ohio*, 513 U.S. 1167 (1995).

Petitioner claims that the Supreme Court of Ohio established the procedure for litigating appellate counsel ineffectiveness claims on February 19, 1992. In *Murnahan*, the Supreme Court of Ohio held that claims for ineffective assistance of appellate counsel could not be raised in post-conviction proceedings. *Id.* at 65. Rather, they should be raised in applications for reconsideration, or more likely, for delayed reconsideration, in the court of appeals where the alleged error took place. The Ohio Supreme Court stated as follows:

> [I]n an individual case where a defendant has put forth a colorable claim of ineffective assistance of appellate counsel, where the circumstances render the application of *res judicata* unjust, and the time periods for reconsideration in courts of appeals and direct appeal to this court have expired, he or she must: (1) apply for delayed reconsideration in the court of appeals where the alleged error took place pursuant to App.R. 26 and 14(B), and if delayed reconsideration is denied, then (2) file for delayed appeal in this court pursuant to Section 8, Rule II of the Rules of Practice of the Supreme Court. Before granting reconsideration, the court of appeals should determine whether there are substantive grounds for relief.

Murnahan, 63 Ohio St.3d at 66. Petitioner filed his Application for Delayed Reconsideration some sixteen months after *Murnahan*.

In 1983, the Court of Appeals for Hamilton County decided *State v. Rone*, C-820640 (1st Dist. Ohio C.A. August 31, 1983). In *Rone*, the Hamilton County Court of Appeals held as follows:

> For these reasons, we conclude that a claim of ineffective assistance of counsel relating to proceedings on *direct appeal* from a judgment of conviction may not be entertained by a trial judge when considering a petition for post-conviction relief. It is, instead, our view that such a claim must be pursued by separate means in a different forum. Other state jurisdictions have permitted the issue to be raised in a reviewing court of last resort by way of a "petition for hearing" in the state supreme court, *People v. Barton* (Cal 1978), 146 Cal. Rptr. 727, 579 P.2d 1043, or in an appellate court by way of a petition for a writ of habeas corpus, *Knight v. State* (Fla. 1981), 394 So.2d 997, and we see no reason why similar means could not be employed in Ohio. We are further convinced that the appellate court in which counsel has been alleged ineffective could consider the issue upon a motion for reconsideration of its own judgment.

Rone, Slip Op. at 7-8. In *State v. Poindexter*, No. C-890734, 1991 Ohio App. LEXIS 888 (March 6, 1991), the Hamilton County Court of Appeals adhered to the analysis and holding of *Rone* and ruled that claims for ineffective assistance of appellate counsel could not be raised in a post-conviction petition. *Poindexter*, 1991 Ohio App. LEXIS 888 at *36. The Court of Appeals

offered some alternatives to post-conviction relief, including a motion for reconsideration filed in the Court of Appeals or a direct appeal to the Supreme Court of Ohio. *Id.* Petitioner may not claim that a confusion in the law prevented him from presenting his ineffectiveness claim prior to *Murnahan* because he could not determine where and how to file such a claim.

Rone provided three alternative remedies to be pursued by a petitioner claiming ineffective assistance of appellate counsel: (i) a petition for hearing in the Ohio Supreme Court; (ii) a writ for habeas corpus in the Ohio Court of Appeals; or (iii) a motion for reconsideration in the Ohio Court of Appeals. The first two were merely illustrations of what other state courts have done. The third was a conviction by the Court of Appeals for Hamilton County that the appellate court where counsel was alleged to have been ineffective could consider the issue upon a motion for reconsideration.

Rone had been decided long before Petitioner Combs' direct appeal to the Court of Appeals for Hamilton County and the Supreme Court of Ohio. Further, the Court of Appeals for Hamilton County had relied upon *Rone* in numerous decisions. These decisions also came before the Supreme Court of Ohio's decision in *Murnahan*. Even if conflict existed on the issue statewide, the *Rone* decision was consistently applied in Hamilton County. Petitioner was, therefore, on notice that *Rone* was controlling and that he had to utilize the remedies laid out in that decision.

Petitioner, however, chose not to utilize any of the remedies set forth in *Rone*. He did not even use the one remedy that the Court of Appeals unambiguously designated: a motion for reconsideration in the appellate court from which the claim arose. Not until sixteen months after *Murnahan* was issued did petitioner file an

application for delayed reconsideration. The Court of Appeals denied his application as untimely and for failure to demonstrate good cause for the delay.

The Court finds no error in that denial. The Court recognizes that, prior to *Murnahan*, no procedure was established *statewide* to present an appellate ineffectiveness claim. In Hamilton County, however, the procedure set forth in *Rone* for initiating ineffective assistance of appellate counsel claims was firmly established and regularly followed long before Petitioner filed his application for delayed reconsideration.

Petitioner was required to file an application for reconsideration in the Court of Appeals for Hamilton County if he wanted his ineffective assistance of appellate counsel claim heard. Without a definitive statement by the Supreme Court of Ohio, which was not forthcoming until the 1992 decision in *Murnahan*, Petitioner was required to rely upon decisions by the Court of Appeals for Hamilton County. By the time his direct appeals were decided, several unpublished opinions from Hamilton County relied on *Rone*.[3] When he eventually filed his Application for Delayed Reconsideration in June 1993, sixteen months after *Murnahan*, numerous other decisions relying upon *Rone* had been issued.[4] Even

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[3] *See, e.g., State v. Sowell*, 73 Ohio App.3d 672 (1991); *State v. Poindexter*, No. C-890734, 1991 Ohio App. LEXIS 888 (Hamilton Cty. March 6, 1991); *State v. Freeman*, No. C-830952 (Ohio Ct. App. October 31, 1984); *State v. Wilson*, No. C-830134 (Ohio Ct. App. December 14, 1983); *State v. Johnson*, No. C-820825 (Ohio Ct. App. September 21, 1983).

[4] *State v. Van Hook*, No. C-910505, 1992 Ohio App. LEXIS 5350 (Hamilton Cty. October 21, 1992); *State v. Byrd*, No. C-910340, 1992 Ohio App. LEXIS 861 (Hamilton Cty. February 26, 1992); *State v. Holloway*, No C-900805, 1992

assuming that Petitioner was under no legal obligation to pursue the motion for reconsideration suggested by *Rone* and that he did not demonstrate a bad faith attempt to string out his appellate and postconviction remedies by tactically deciding to present the claim one and one-half years after the Ohio Supreme Court decided his direct appeal and avoiding raising the claim in an application for reconsideration, a remedy recognized by the Court of Appeals for Hamilton County, this Court cannot say that the Court of Appeals misapplied Ohio law or acted in a manner inconsistent with a federal court enforcing a state procedural bar when it held that Petitioner Combs had failed to demonstrate good cause for his delay in moving for reconsideration. Indeed, this Court is legally bound to enforce the Ohio court's procedural bar.

ff. Forty-First Claim for Relief. **The prosecutor impermissibly sought and secured juror commitments to sentence Petitioner to death.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner contends that the ineffectiveness of his appellate counsel and the participation of Mr. Stidham as counsel at trial and on direct appeal are cause for his

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Ohio App. LEXIS 283 (Hamilton Cty. January 29, 1992); *State v. Zuern*, Nos. C-900481 and C-910229, 1991 Ohio App. LEXIS 5733 (Hamilton Cty. December 4, 1991); *State v. Bedford*, No. C-900412, 1991 Ohio App. LEXIS 4252 (Hamilton Cty. September 11, 1991).

failure to raise this claim on direct appeal. As previously stated, the Court rejects Petitioner's cause argument and again concludes that the failure to raise this claim on direct appeal is not supported by cause.

The Court further concludes that Petitioner has not established that he was prejudiced by the asserted conduct of the prosecuting attorney. Petitioner construes the interchanges between the prosecutor and various jurors as the solicitation and receipt of commitments to sentence Petitioner to death. Such a construction is not supported by the record. None of the answers given by the jurors amounts to a commitment to impose the death penalty. At most, the prosecution asked jurors whether they would be able to apply the law, regardless of the consequences, even if the consequence might be a death sentence, and the jurors agreed that they would. The Court concludes that such an agreement was entirely appropriate, consistent with the jurors' duties, and did not give rise to a genuine risk of a fundamental miscarriage of justice.

gg. Forty-Second Claim for Relief. **The prosecutor repeatedly misstated the law to jurors during voir dire.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner's contention that cause is established by virtue of the ineffectiveness of his appellate counsel and the participation of Mr. Stidham as counsel at trial and on direct appeal is again rejected. Moreover, the Court

concludes that Petitioner has not established that he was prejudiced by the asserted conduct by the prosecution.

The trial court instructed the jury at every phase of Petitioner's trial. The court informed the jury that it was to be guided by the court's instructions. Petitioner has established no basis for a conclusion that the trial court's instructions were ineffective in eliminating any confusion about the law to be applied by the jury. The Court concludes that Petitioner has not demonstrated that any asserted misstatement of the law by the prosecution gave rise to a genuine risk of a fundamental miscarriage of justice.

hh. Forty-Third Claim for Relief. **The prosecution improperly exercised their peremptory challenges.**

This claim was not raised on direct appeal. Petitioner Combs raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

The Court rejects Petitioner's contention that cause for his failure to raise the claim on direct appeal is established by virtue of the ineffectiveness of his appellate counsel. The Court further concludes that Petitioner has not established that he was prejudiced by the asserted conduct by the prosecution.

Petitioner has not demonstrated that the prosecution's use of its peremptory challenges gave rise to a genuine risk of a fundamental miscarriage of justice. He has not identified a basis for a conclusion that the jury that ultimately decided his guilt and sentence was unfair

or partial. Absent such a showing, he cannot demonstrate that he was prejudiced by virtue of the prosecution's use of its peremptory challenges.

ii. Forty-Fourth Claim for Relief. **The prosecution admitted improper evidence during the culpability phase of Petitioner's trial.**

This claim was not raised on direct appeal. Some of the sub-claims were raised postconviction before the Hamilton County Court of Common Pleas, which concluded that those claims were barred by the doctrine of *res judicata* because they could have been raised on direct appeal.

Petitioner's arguments in support of a conclusion that cause is established by virtue of the ineffectiveness of his appellate counsel is rejected, as set forth more fully above. The Court also concludes that Petitioner cannot establish prejudice, which would permit this Court to examine this claim in spite of the procedural bar.

None of the asserted errors gave rise to a genuine risk of a fundamental miscarriage of justice. Petitioner Combs bases this claim upon the prosecution's introduction of the following evidence and statements:

(1) Petitioner's pre-murder abuse of Peggy Schoonover (Transcript, p.891);

(2) Peggy Schoonover's statement, prior to her death: "I'm ready for him, I've got my mace"(Transcript, p.976);

(3) testimony by hospital personnel that, after he was shot, Petitioner was uncooperative, verbally

abusive, obnoxious, belligerent, and angry (Transcript, p.1059-60, 1089, 1256);

(4) testimony from Dr. Fisher concerning the purposefulness of Petitioner's actions (Transcript, p.1338);

(5) statements by the prosecution about extra shells taped to Petitioner's body (Transcript, p.1401);

(6) the suggestion by the prosecution that the victims' "totally good lives" were aggravating factors (Transcript, p.1406); and

(7) the prosecution's comment upon Petitioner's decision to make an unsworn statement during the penalty phase (Transcript, p.1419-20, 1426).

In light of the evidence presented at trial and the instructions given to the jury by the trial court, this Court concludes that Petitioner cannot demonstrate prejudice by virtue of any of the asserted errors, either individually or cumulatively. The jury was properly informed of the legal standards to be applied during its deliberations. Moreover, the evidence of Petitioner's guilt was overwhelming, and the Court cannot conclude that a fundamental miscarriage of justice could have resulted from the admission of any of the evidence cited by Petitioner in support of this claim. Moreover, with regard to each item of evidence, the Court concludes that Petitioner has not established that the prosecution's introduction (or admission, in Petitioner's terminology) was error. In any event, the Court concludes that Petitioner has not established either that cause supported his failure to raise this claim on direct appeal or that he was prejudiced in such a manner that this Court may consider the claim on its merits.

jj. Forty-Sixth Claim for Relief. **The prosecution improperly confused the jury as to Petitioner Combs' mitigation evidence.**

This claim was not raised on direct appeal. The claim was raised postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

The Court rejects Petitioner's arguments in support of a conclusion that cause is established by virtue of the ineffectiveness of his appellate counsel for the reasons set forth above. The Court further concludes that Petitioner cannot establish prejudice, which would permit this Court to examine this claim in spite of the procedural bar.

Petitioner contends that the prosecution's references to the heinousness of Petitioner's crimes confused the jury as to the proper considerations in the sentencing phase of his trial. Petitioner contends that those references constitute improper victim impact evidence, which inflamed the jury and destroyed the rationality required in capital sentencing. Petitioner further contends that the prosecution confused the jury by arguing that Petitioner's mitigation evidence did not provide an excuse for his crimes.

The Court concludes that neither of the asserted errors gave rise to a genuine risk of a fundamental miscarriage of justice. As regards the comments on the terror and horror of the victims, the jury had already heard all of the evidence concerning the circumstances of the crimes. The prosecution did not present evidence that was not before the jury and, in highlighting that evidence, did not negate the trial court's instructions concerning the

proper considerations during the sentencing phase of the trial. For the same reason, the Court rejects Petitioner's prejudice argument based upon the prosecution's suggestion that Petitioner's mitigation evidence did not excuse his crimes. Because the trial court's charge to the jury was sufficiently clear with regard to the proper consideration of mitigating evidence, the Court concludes that Petitioner was not prejudiced as required for the Court to consider the claim notwithstanding the procedural bar.

kk. Forty-Seventh Claim for Relief. **The state improperly interfered with Petitioner's efforts to interview witnesses.**

Petitioner Combs contends that probation officer Linda Elliott did not refuse Petitioner's attempt to interview her of her own volition but that the state unduly influenced her to refuse the interview. Petitioner did not present that claim to the Ohio courts on direct appeal or postconviction. In any event, Petitioner has not introduced a shred of evidence to support his claim of interference or to show that Ms. Elliott did not refuse his request for an interview of her own volition. Petitioner has also failed to demonstrate that Ms. Elliott's refusal to be interviewed on Petitioner's terms, in 1993, had any potential bearing on the outcome of his trial or his petitions for postconviction relief. Moreover, Petitioner has not demonstrated cause for his failure to present whatever mitigating evidence he believes Ms. Elliott could have provided prior to 1993. For those reasons, the Court concludes that this claim is procedurally barred and is meritless to the extent that it is not barred.

ll. Forty-Eighth Claim for Relief. **There was insufficient evidence that the aggravating circumstances out-weighed the mitigating factors beyond a reasonable doubt.**

This claim was not raised on direct appeal. Petitioner raised the claim postconviction before the Hamilton County Court of Common Pleas, which concluded that the claim was barred by the doctrine of *res judicata* because it could have been raised on direct appeal.

Petitioner's arguments in support of a conclusion that cause supports his failure to raise this claim on direct appeal are rejected for the reasons stated previously. The Court further concludes that Petitioner cannot demonstrate that prejudice resulted.

The Ohio Supreme Court conducts an independent reassessment of the aggravating circumstances and mitigating factors when it considers a case in which the appellant has been sentenced to death. That court undertook such a reassessment in Petitioner's case. *See State v. Combs*, 62 Ohio St.3d at 293-94. Petitioner was not, therefore, prejudiced by his failure to raise this claim on direct appeal.

mm. Fifty-First Claim for Relief. **The system used by the Hamilton County Prosecutor's office in seeking and securing death penalty convictions and death sentences is discriminatory.**

This claim was not raised on direct appeal or postconviction before the courts of Ohio. Moreover,

Petitioner's arguments in support of the claim do not disclose the manner in which the attacked "process" is discriminatory. Rather, Petitioner contends that the review of his conviction and sentence by the Ohio appellate courts was meaningless. Petitioner further contends that meaningless review is the standard in those courts.

Absent some explanation of the claims, the Court will not consider Petitioner's claim that the review was "meaningless." Petitioner's claim is based largely upon the manner in which the Ohio appellate courts have considered other appeals from convictions and death sentences. The Court's review of the decisions of the Court of Appeals for Hamilton County and the Ohio Supreme Court in *Petitioner's* direct appeals suggests that those courts considered all of Petitioner's claims to the extent that they could properly do so. Petitioner's claim is **DENIED** to the extent that it is not procedurally barred.

nn. Fifty-Third Claim for Relief. **Petitioner Combs was denied his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because his death sentence is unreliable and inappropriate and violates the Eighth and Fourteenth Amendments.**

This claim is Petitioner's catch-all with regard to the errors asserted in other Claims for Relief. Petitioner contends that, considered cumulatively, the errors of defense counsel, the prosecution, and the trial court deprived Petitioner of a fair trial and a reliable death sentence.

The Court first observes that Petitioner failed to raise this claim on direct appeal. The claim was asserted postconviction before the Hamilton County Court of Common Pleas, which concluded that it could not properly consider the claim inasmuch as it was based, in part, upon errors by the Ohio Court of Appeals. Petitioner failed to raise the claim postconviction before the Ohio appellate courts. The claim is, therefore, waived. Even were the Court to consider the merits of the claim, however, the Court would **DENY** the claim.

The United States Court of Appeals for the Sixth Circuit has recognized that errors that individually do not rise to the level of a constitutional violation may, when considered cumulatively, render a trial fundamentally unfair. *See Lundy v. Campbell*, 888 F.2d 467, 472-473 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990); *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983), *cert. denied*, 464 U.S. 951 (1983). The ultimate question is whether the asserted trial errors, measured according to the fundamental principles of a fair criminal process implicit in the due process clause of the Fourteenth Amendment, were so egregious as to have nullified the legitimacy of the properly admitted substantive evidence of Petitioner's guilt. *Lundy*, 888 F.2d at 473.

Petitioner bases his Fifty-Third Claim for Relief upon the cumulative errors at trial without specifically identifying which errors, in the aggregate, deprived him of a fundamentally fair criminal process. For the reasons set forth above, Petitioner's First, Second, Third, Sixth, Seventh, Eighth, Ninth, Eleventh, Fourteenth, Fifteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-Second, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, Thirtieth, Thirty-First, Thirty-Second, Thirty-Third, Thirty-Fourth, Thirty-Fifth, Thirty-Sixth, Thirty-Seventh, Thirty-Eighth,

Thirty-Ninth, Forty-First, Forty-Second, Forty-Third, Forty-Sixth, and Forty-Eighth Claims for Relief are procedurally barred. His Twenty-Fourth and Forty-Seventh Claims for Relief are **DENIED** on their merits to the extent that they are not procedurally barred. His Fifty-First Claim for Relief is **DENIED** to the extent that it is not waived. The Court further concludes that Petitioner has failed to prove that, considered cumulatively, the errors alleged in all the claims considered on the merits in this Opinion and Order denied him a fundamentally fair trial.

Moreover, the evidence of Petitioner Combs' guilt is overwhelming. The evidence leaves absolutely no room for doubt that Petitioner Combs murdered Peggy and Joan Schoonover and that those murders were intentional. The evidence of purpose and prior calculation and design is convincing. Evidence in support of his intoxication defense is less than compelling when considered in light of the unusually substantial amount of planning he undertook in preparation for the crimes. The alleged constitutional errors, considered cumulatively, are not such that a court could find that Petitioner was denied a fundamentally fair trial and a fair and accurate guilt and penalty determination. The Court concludes that the alleged constitutional errors, considered cumulatively, are not so egregious as to have nullified the legitimacy of the properly admitted substantive evidence of Petitioner's guilt with respect to the crimes or the aggravating circumstances. *Lundy*, 888 F.2d at 473. For those reasons, Petitioner's claim based upon the cumulative asserted errors is **DENIED**.

C. Merits Review of Claims Fairly Presented to the Courts of Ohio

The following thirteen claims were raised before the Ohio courts and considered by those courts on their

merits or for plain error. This Court's analysis of those claims follows.

1. Fourth Claim for Relief. **The trial court improperly instructed the jury on the purposes for which it could consider Petitioner Combs' statement to the police.**

Petitioner did not object to the admission of his statement to Officer Ventre that he should "talk to . . . my lawyer" or to the trial court's instruction that the jury could not consider the statement with regard to Petitioner's guilt but that it could consider the statement as evidence of purpose or prior calculation and design. On direct appeal, Petitioner asserted that the trial court's instruction was error. In its decision on Petitioner's appeal, the Ohio Supreme Court ruled as follows:

> Since Combs objected neither to the evidence nor to the trial judge's *sua sponte* instruction, the issue must be analyzed on the basis of plain error. *State v. Long*, (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804; *State v. Wade* (1978), 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244.
>
> Courts disapprove of penalties imposed for exercising the right to remain silent and to consult an attorney. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, prohibits comments by prosecutors seeking to premise guilt findings on a defendant's failure to testify. *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91, condemned the use of post-arrest silence to impeach a defendant's trial testimony. *Wainwright v. Greenfield* (1986), 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623, and *State v. Rogers* (1987), 32 Ohio St.3d 70, 512 N.E.2d 581, reversed

convictions when defendants' pretrial exercise of rights of silence and to consult attorneys was used to refute insanity pleas.

The state argues that this principle only applies when *Miranda* warnings promise no adverse consequences from silence, and here no *Miranda* warnings were given. *See Jenkins v. Anderson* (1980), 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86; *Fletcher v. Weir* (1982), 455 U.S. 603, 606, 102 S.Ct. 1309, 1311-12, 71 L.Ed.2d 490, 494.

However, at the point when Combs was placed in the ambulance, we find that Combs was in custody and had a right to remain silent, consult a lawyer, and receive a *Miranda* warning. When he arrived at the scene, Officer Ventre personally took the shotgun from Combs; there were two women dead from shotgun blasts in the adjacent car; and Ventre had been at the scene for some ten to fifteen minutes. Ventre's questioning, without a *Miranda* warning, violated those rights. Using Combs' comment, "talk to * * * [my] lawyer," in evidence at trial also violated his rights as viewed by *Griffin v. California, supra*.

Additionally, the "talk to my lawyer" evidence does not relate to or tend to prove prior calculation and design or purposefulness. Combs' comment simply meant that he was exercising his right to counsel and nothing more. Even if this remark was initially admissible, Evid.R. 401 and 403 would otherwise invite exclusion from evidence. No justification is apparent for the instruction that the evidence related to either purposefulness or prior calculation and design. Thus, we conclude the trial court erred in allowing this remark into evidence and instructing the jury to consider the

> remark in relation to purposefulness and prior calculation and design.
>
> Nonetheless, neither the evidence nor the instruction constituted plain error. The evidence did not cause a miscarriage of justice, and neither the evidence nor the instruction produced a different result in the case. Since Combs' remark does not tend to prove either prior calculation and design or purposefulness, the jury could not have relied upon it to make those findings.
>
> Other compelling evidence established purposefulness and prior calculation and design. Combs spent a considerable part of the afternoon of the murders searching for a shotgun. He asked two people for a shotgun, and eventually drove over eighty miles before returning to Cincinnati with a shotgun. The evidence indicates he stole the shotgun he used. After he drove back to Cincinnati, he confronted Joan and Peggy and initiated a car chase over several blocks, eventually cornering them at the Holiday Park Tower office building. He deliberately knocked out a window in their car and fired a shotgun into each woman's head at close range. Those facts alone establish both purposefulness and prior calculation and design. Thus, Combs has not shown plain error.

State v. Combs, 62 Ohio St.3d 278, 281-82 (1991).

As the Ohio Supreme Court noted, the trial court's instruction infringed upon Petitioner's constitutional rights to remain silent and to consult an attorney. *See Griffin v. California*, 380 U.S. 609 (1965). Accordingly, Petitioner's claim is cognizable in a federal habeas corpus proceeding. *See Wainwright v. Goode*, 464 U.S. 78, 84

(1983). The Court concludes, nevertheless, that the error does not require that his petition be granted.

The error, though presented in terms of the trial court's instruction to the jury, is, in fact, a violation of *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). Violations of *Miranda* do not necessarily mandate reversal of a conviction obtained after admission of statements illegally obtained. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In order to establish a claim for relief, Petitioner must show that the statement had a "substantial and injurious effect" on the jury's verdict. *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court is not persuaded that Petitioner's "talk to . . . my lawyer" statement had, or could have had, any effect on the jury's verdict.

While the trial court erroneously instructed the jury that consideration of Petitioner's statement in the examination of the asserted aggravating circumstances was permissible and appropriate, the Court cannot conceive of a manner in which the jury would have found the statement to be relevant to either purpose or prior calculation and design. The fact that a suspect directs police to his attorney after the commission of a crime does not lend support to a claim that he acted with purpose or pursuant to prior calculation and design. Any suggestion to the contrary by Petitioner is beyond credulity. While the statement might, in a vacuum, have had some bearing on the jury's assessment of Petitioner's guilt, the evidence of his guilt was overwhelming, and Petitioner did not seriously contend that he was not guilty of the murders. Accordingly, his convictions were not tainted by the introduction of his statement to the police or the trial court's instruction concerning that statement, and his Fourth Claim for Relief is **DENIED**.

2. Fifth Claim for Relief. **The trial court improperly admitted an involuntary statement of the Petitioner as evidence of purpose and prior calculation and design.**

Petitioner Combs contends that unspecified constitutional rights were violated by the trial court's admission of his statements to nurse Leigh Ann Wright concerning the victims. Petitioner contends that the statements were involuntary, inasmuch as he was injured and intoxicated. He further contends that the statements should have been excluded, pursuant to Rule 403 of the Ohio Rules of Evidence as more prejudicial than probative.

The Ohio Supreme Court ruled as follows concerning Petitioner's claim:

> Combs argues involuntariness based on alcohol, the surgery, and the effects of drugs he was given before and after surgery.
>
> However, Combs cannot benefit from the rule that excludes involuntary confessions. In *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, the Supreme Court refused to recognize "the right of a criminal defendant to confess to his crime only when totally rational and properly motivated * * *." Instead, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly, supra*, at 166, 167, 107 S.Ct. at 521, 522, 93 L.Ed.2d at 484.
>
> In this case, Combs presented no evidence of coercive police activity or police questioning.

> Wright simply responded to a question that Combs asked, and Combs' remarks cannot be excluded as involuntary under the Fourteenth Amendment, whatever his mental state at the time. *Colorado v. Connelly, supra*.
>
> Even if Combs' statements were found inadmissible, reversal would not be required. Combs did not object; hence he waived all but plain error, and Combs' convictions did not rest on this confession. Combs conceded at trial that he had shot the two women, and two witnesses testified they saw him do so. Under the circumstances, the claim of plain error lacks any merit.

State v. Combs, 62 Ohio St.3d at 284-85.

Petitioner has not established that the admission of his statements to nurse Wright violated any of his constitutional rights. While he has not explicitly identified the constitutional provision upon which he bases his claim, the Court can ascertain, by reference to the authority cited in support of the claim, that Petitioner believes the admission of the statements violated his *Miranda* rights.

Petitioner relies upon *Mincey v. Arizona,* 437 U.S. 385, 398 (1978), for the proposition that his statements were involuntary. In *Mincey*, a seriously injured suspect was questioned at length by a detective in the hospital. The Supreme Court concluded that the suspect's statements to the detective were involuntary under the circumstances:

> It is hard to imagine a situation less conducive to the exercise of a rational intellect and free will than Mincey's. He had been seriously wounded

> just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of [Detective] Hust's interrogation was still sufficiently serious that he was in the intensive care unit. He complained to Hust that the pain in his leg was "unbearable." He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation, since some of his written answers were on their face not entirely coherent. Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of Detective Hust, unable to accept or resist the thrust of Hust's interrogation.

Id. at 398-99 (internal quotations and footnote omitted).

The circumstances surrounding Petitioner's statement to nurse Wright resemble the *Mincey* circumstances only to the extent that Petitioner was also severely injured. Petitioner was not interrogated by nurse Wright, who had absolutely no role in the investigation of Petitioner's crimes. He apparently asked nurse Wright a question about the fate of his victims, and she responded. He followed up with his derogatory statements concerning the victims.

Unlike the suspect in *Mincey*, Petitioner was not at the mercy of a law enforcement or other investigating official when he made the statements. The Court does not conclude that the statements were involuntary in the fashion that the statements at issue in *Mincey* were involuntary.

Petitioner also relies upon *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986), for the proposition that his *Miranda* rights were violated by the admission of his statements to nurse Wright. That decision is inapposite. In *Greenfield*, the Court concluded that

> it was fundamentally unfair for the Florida prosecutor to breach the officers' promise to [Greenfield] by using his postarrest, post-*Miranda* warnings silence as evidence of his sanity.

In *Greenfield*, the suspect's silence, which was introduced by the prosecution as evidence of his sanity, was his response to interrogation by law enforcement personnel. *Miranda* warnings had been given, and the Supreme Court concluded that the rights attendant to the *Miranda* warnings were violated when the suspect's silence was introduced as evidence against him.

The context of Petitioner Combs' statements is distinguishable from the contexts in *Mincey* and *Greenfield*, inasmuch as Petitioner was not subject to interrogation at the time the statements were made, was not pressured to make the statements, and had no reason to believe that the protections attendant to questioning by law enforcement personnel also applied to his voluntary, unsolicited statements to a hospital nurse.

In *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), the Supreme Court ruled as follows:

> We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.

In the absence of evidence of coercive police activity, then, the admission of Petitioner Combs' statements neither

violated his *Miranda* rights nor his rights under the due process clause.

Petitioner finally argues concerning his statements to nurse Wright that they should have been excluded pursuant to Rule 403 of the Ohio Rules of Evidence, inasmuch as they were more prejudicial than probative. Questions concerning the admissibility of evidence are not generally cognizable in federal habeas corpus. *See Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988). The exception is when the violation of a state's evidentiary rule has resulted in the denial of fundamental fairness, thereby violating due process. *Id.* Habeas corpus relief is available when the asserted error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

In Petitioner's case, the Court concludes that the admission of his statements to nurse Wright did not violate fundamental fairness. The statements were arguably or potentially probative with respect to the issues of purpose and prior calculation and design. The trial court tacitly concluded that they were not more prejudicial than probative in admitting them. Petitioner contends that that conclusion was not only erroneous but denied him a trial that was fundamentally fair.

The Court cannot agree with Petitioner's fundamental fairness argument. The jury was quite aware of Petitioner's condition at the time the statements were made. The jury, as the trier of fact, was in a position to determine whether, and to what extent, to discount the statements in light of Petitioner's condition. No authority cited by Petitioner suggests that the statements are devoid of all probative value by virtue of the circumstances in which they were made. In the

Court's view, fundamental fairness would only have been implicated had the statements been admitted without any contextual information to permit the jury to determine what weight, if any, to assign to them. That not having been the case, the Court concludes that Petitioner was not deprived of a fundamentally fair trial by virtue of the admission of his statements to nurse Wright. For that reason and those set forth above, Petitioner's Fifth Claim for Relief is **DENIED**.

3. Tenth Claim for Relief. **The trial court improperly excluded evidence of blood tests.**

Petitioner contends that the trial court erred, and violated unspecified constitutional rights, by excluding evidence of a blood test. Petitioner contends that the evidence was relevant and probative with respect to his intoxication defense and in mitigation.

The Ohio Supreme Court addressed this claim as follows:

> Combs correctly points out that any information about his blood-alcohol level on the date of the offense was relevant in both the guilt and punishment phases. *State v. Sowell* (1988), 39 Ohio St.3d 322, 324, 530 N.E.2d 1294, 1299; *see Bell v. Ohio* (1978), 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010.
>
> However, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. Even relevant evidence may be excluded, under Evid.R. 403(A), if its "probative value is substantially outweighed by the danger of

unfair prejudice, of confusion of the issues, or of misleading the jury."

Extreme uncertainty surrounded this particular report. The only date reflected in the proffered report was January 21, 1988, which was six months after Combs' hospital admission. Combs proffered no evidence as to when or why the test was given, who gave it, or under what circumstances it was given. Thus, the test was not admissible under the hearsay exception for business records. Combs did *not* establish that the report was made "at or near the time" of the event. Evid.R. 803(6).

Additionally, Combs proffered no explanation as to what the test results meant. As the court of appeals noted, "[t]his report reflected, without interpretation, raw data that would, by itself, have been unintelligible to the ordinary layperson." The test results could easily have been misinterpreted. Under these circumstances, the trial judge did not err in rejecting the report even though the parties agreed it was a hospital record.

Moreover, any error was harmless. Combs presented extensive evidence concerning his drinking prior to the offenses, and the prosecutor conceded that point. Thus, information about his blood-alcohol test was cumulative. Furthermore, our independent sentence reassessment will cure any error to the effect that it might affect the sentences. *See State v. Landrum, supra*, 53 Ohio St.3d 107 at 124, 559 N.E.2d 710 at 729; *State v. Lott, supra*, 51 Ohio St.3d 160 at 170, 555 N.E.2d 293 at 304.

State v. Combs, 62 Ohio St.3d at 284.

As the Court has previously noted, claims based upon the state trial court's evidentiary rulings are not cognizable in federal habeas corpus except when the violation of a state's evidentiary rule has resulted in the denial of fundamental fairness, thereby violating due process. *Cooper v. Sowders*, 837 F.2d at 286. The Ohio Supreme Court observed that Petitioner could not establish that the blood test result that he wished to have admitted was relevant or probative because he could not establish the date upon which the test was taken. Having failed to establish admissibility, Petitioner cannot successfully assert that he was denied a fundamentally fair trial by virtue of the exclusion of the evidence. Were Petitioner to succeed in establishing that he is entitled to a new trial, the blood test result would not be any more admissible than it was at his original trial. Because Petitioner has not demonstrated that the evidence was incorrectly excluded and that he was deprived of a fundamentally fair trial by virtue of its exclusion, his Tenth Claim for Relief is **DENIED**.

4. Twelfth Claim for Relief. **The trial court improperly classified and weighed aggravating circumstances.**

Petitioner observes that Ohio law requires that the trial court state, in a separate opinion, its findings as to the existence of any mitigating factors, the aggravating circumstances, and the reasons why the aggravating circumstances were sufficient to outweigh the mitigating factors. O.R.C. §2929.03(F). Petitioner Combs contends that the trial court erred, in its separate opinion regarding sentencing, by failing to give adequate weight to Petitioner's evidence of intoxication and alcoholism on the ground that such evidence did not negate Petitioner's intent to kill. Petitioner contends that the intent to kill was not a sentencing phase issue and, thus, should not

have been balanced against the evidence of intoxication and alcoholism in the trial court's separate opinion regarding sentencing.

Petitioner also contends that the trial court erred by considering the nature and circumstances of the offenses as aggravating circumstances. Petitioner contends that the nature of the offenses is a permissible consideration only in mitigation. Petitioner has not identified a constitutional right of which he was deprived by virtue of the asserted errors of the trial court.

The trial court's separate opinion provides as follows, in its entirety:

> On February 17, 1988 the jury returned verdicts finding the defendant, Ronald Dean Combs, guilty of Aggravated Murder as charged in the First and Second Counts of the indictment and guilty of Specification One of an aggravating circumstance as to each count. Following the sentencing hearing conducted on February 22, 1988, the jury returned verdicts imposing a sentence of death as to both Counts of the indictment and the accompanying Specifications. Pursuant to [O.]R.C. §2929.03(D)(3), the Court continued the date for sentence to March 1, 1988 upon receiving the jury's recommendation that the sentence of death be imposed. In the interim the Court has independently reviewed the relevant evidence presented at trial, the testimony, other evidence, the unsworn statement of the defendant, and the arguments of counsel to determine if there is proof beyond a reasonable doubt that the aggravating circumstances defendant was found guilty of committing in Specification One to the First and Second Counts of the indictment outweighs [sic]

the mitigating factors.

FACTS DEVELOPED AT TRIAL

The defendant was indicted in a two count indictment for the Aggravated Murder of Joan Schoonover and of Marguerite Peggy Schoonover in violation of [O.]R.C. §2903.01. Specification One to each Count alleged that the Aggravated Murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by defendant. Specification two to each Count alleged pursuant to [O.]R.C. §2941.142, that the defendant had on or about his person, or under his control, a firearm while committing the offense of Aggravated Murder. As to each Count and each Specification the jury returned a verdict of guilty.

Defendant was the father of an illegitimate child born to Marguerite Peggy Schoonover. In 1987 his relationship with Ms. Schoonover had become strained, and his attempts to visit his son, then four years of age, were rebuffed by Ms. Schoonover and her mother, Joan Schoonover.

On July 15, 1987 the defendant drove to Mt. Orab, Ohio and obtained a double barreled shotgun from an uncle's home. He took this weapon without the uncle's knowledge or permission by forcibly entering the uncle's residence. Defendant then drove via Route 32, Interstate 275, and Interstate 471 to Fourth and Sycamore Streets in Cincinnati, the location of Marguerite Peggy Schoonover and Joan Schoonover's place of employment, Forward Movement Publications. It was around 4:00 P.M. The Schoonovers had left work and were walking toward their parking garage as defendant arrived

at the intersection. Seeing them, he backed his car through traffic almost striking a coworker, Father Robert Horin [sic]. He then sped away squeeling [sic] tires.

Defendant was seen shortly thereafter blocking the Schoonover automobile on the access ramp to Linn Street. A chase ensued into the parking lot of the Holiday Inn on Linn Street where both automobiles stopped near the lobby entrance. Defendant exited his automobile with the shotgun and walked to the passenger side of the Schoonover automobile. A witness saw defendant striking the window on the passenger side several times with the shotgun barrels until the window broke. He then fired two shots into the automobile killing Marguerite Peggy Schoonover and the driver, Joan Schoonover.

As defendant returned to his automobile an off-duty Hamilton County Deputy Sheriff heard the shots and confronted defendant asking him to leave his automobile. Defendant, who was partially inside on the driver's side, began to raise the shotgun, and the deputy fired his 38 Magnum six times. Defendant left the automobile, but slumped to the ground in a sitting position still fumbling with the shotgun before he surrendered. He was shot six times. Three wounds resulted in defendant's right arm being amputated and partial paralysis of the left arm.

AGGRAVATING CIRCUMSTANCES

(1) An eyewitness, Mr. Hughes, saw the defendant use the shotgun to bash in the passenger window of the automobile in which Marguerite Peggy Schoonover and Joan Schoonover were riding. He testified that defendant pointed and then twice discharged the shotgun into the automobile. Dr. David M. Smith, the pathologist, testified that both women died instantly from shotgun wounds. William Schrand, a firearms examiner in the Coroner's Office, testified that the shotgun, taken from defendant, was test fired and operable. Mr. Schrand connected the spent shells and fragments recovered at the scene by the criminalist, John Zamparo, to the shotgun. The defense conceded that defendant killed both Marguerite Peggy Schoonover and Joan Schoonover.

(2) As to the element of purposeful killing, the evidence established that the defendant: (a) obtained a shotgun in Mt. Orab; (b) drove 50 miles to Cincinnati arriving at the time the Schoonovers usually left work; (c) upon seeing them, he tracked their automobile; (d) approximately a mile from the intersection of Fourth and Sycamore, he blocked their automobile; (e) then followed them into the parking lot of the Holiday Inn; (f) where he left his own automobile; (g) used the shotgun to break the window of the Schoonover automobile; (h) pointed and twice fired the shotgun which had a separate trigger for each barrel; and (i) when taken into custody, he was found to have two shotgun shells taped to his abdomen.

(3) Counsel for the State furnished the jury with abundant evidence from which it could reasonably conclude that the aggravating circumstance

alleged in Specification One to the First and Second Counts of the indictment had been proven beyond a reasonable doubt.

MITIGATING FACTORS

The mitigating factors listed in [O.]R.C. §2929.04(B) as they relate to the testimony and evidence are as follows:

(1) "Whether the victim[s] of the offense induced or facilitated it." Defendant in his unsworn statement said that he was experiencing anguish because Marguerite Peggy Schoonover and her mother were not allowing him visitation of his son. However, the evidence conclusively establishes that the defendant tracked down his victims, chased them, and while they were attempting to flee, cornered and killed them.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation." Clearly, the mother's refusal to afford visitation to the father does not justify his killing the child's mother or grandmother, nor is his suggested stress tantamount to duress, coercion, or strong provocation contemplated by the statute.

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." The Court finds no evidence of a mental disease or defect. Dr. Fisher, a clinical psychologist appointed by the Court as defendant's expert, testified that the

defendant did not suffer from any mental disease or defect nor did he lack substantial capacity to appreciate the criminality of his conduct. Dr. Fisher did testify as to defendant's history of alcohol and drug abuse. He was of the opinion, that although the defendant was under the influence of drugs and alcohol on July 15, 1987, he was capable of acting purposely.

(4) "The youth of the offender." The Court finds that youth is not an issue since the defendant is 30 years of age.

(5) "The offender's lack of significant history of prior criminal convictions and delinquent adjudications." The defense presented no evidence as to defendant's criminal record or lack of it. Since defendant did not testify under oath, neither did the State offer evidence that defendant had a criminal record.

(6) "If the offender was a participant but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim[s]." The evidence that defendant was the principal offender is uncontradicted.

(7) "Any other [mitigating] factors that are relevant to the issue of whether the offender should be sentenced to death." In the unsworn statement defendant maintained, that the anxiety he experienced from Marguerite Peggy Schoonover's denial of visitation with his son, caused him to abuse drugs and alcohol and go out of control. He testified that he experienced a blackout and remembers nothing of the incident

until the deputy sheriff started to fire at him. However, Captain Lautz, a paramedic, who arrived on the scene and assisted in transporting the defendant to University Hospital, was of the opinion that defendant was responsive and not under the influence of drugs or alcohol at the time.

Of his two illegitimate children by different women defendant apparently did enjoy the company of his son born to Marguerite Peggy Schoonover. Despite his failure to pay support for the child, defendant did spend time with him. It appears that this son was also fond of defendant.

CONCLUSION

Proof of the manner in which defendant executed Marguerite Peggy Schoonover and Joan Schoonover as weighed against the direct evidence and inferences in support of the mitigating factors, permitted the jury to find that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Accordingly, the Court finds that the verdicts are supported by the evidence and adopts the recommended sentence of death as to the First and Second Counts set forth in the jury's verdicts.

The Ohio Supreme Court ruled as follows with respect to this claim:

The trial judge did not err in considering the asserted mitigating factor of intoxication. Instead, the trial judge simply determined that "defendant was responsive and not under the influence of drugs or alcohol at the time." The assessment of and weight to be given to mitigating evidence are

> matters for the trial court's determination. "* * * The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus.
>
> The trial judge's reference to the nature and circumstances of the offense was permissible. That reference explained why the evidence "permitted the jury to find that the aggravating circumstances outweighed the mitigating factors." A trial court or three-judge panel "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." *State v. Stumpf, supra*, 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus. Moreover, the trial court's opinion referred to only one aggravating circumstance, the charged course of conduct. Additionally, our independent sentence reassessment will cure any deficiency in the trial court's sentencing decision. *State v. Landrum, supra*, 53 Ohio St.3d 107, 559 N.E.2d 710; *State v. Lott, supra*, 51 Ohio St.3d 160, 555 N.E.2d 293. Thus Combs' claim of error lacks merit.

State v. Combs, 62 Ohio St.3d at 288.

Absent contrary guidance from Petitioner Combs, the Court assumes that his present claim is based upon a belief that the trial court deprived him of a fundamentally fair trial, by virtue of its asserted errors in applying O.R.C. §2929.03(F), and thereby violated rights guaranteed to Petitioner by the due process clause. The Court disagrees.

The Ohio Supreme Court concluded that the trial court correctly performed the weighing that is required under Ohio law. Petitioner has not demonstrated that the reweighing is required by the Constitution. This Court must defer to the Ohio Supreme Court's interpretation and application of Ohio law. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

In Petitioner's case, the trial court concluded, for reasons that are clear from its separate opinion, that the aggravating circumstances outweighed the mitigating factors and that a sentence of death was appropriate. Nothing about the manner in which the trial court performed its task deprived Petitioner of a fundamentally fair trial. In fact, the trial court clearly did consider the evidence Petitioner had presented in mitigation. Moreover, the trial court's use of the word, "manner," in its conclusion suggests to this Court the aggravated "manner" of the killings, an appropriate consideration, not the nature and circumstances of the killings, as Petitioner suggests. For those reason, Petitioner's Twelfth Claim for Relief is **DENIED**.

5. Thirteenth Claim for Relief. **The trial court improperly instructed the jury on inapplicable statutory mitigators.**

Petitioner contends that the trial court erred by instructing the jury as to all statutory mitigating factors, rather than only as to those upon which Petitioner actually relied. Petitioner contends that, by mentioning all of the statutory factors, the trial court improperly focussed the jury's attention on the fact that Petitioner could not adduce evidence in support of the majority of the factors. Petitioner does not identify a constitutional basis for his claim.

The Ohio Supreme Court addressed this claim as follows:

> In *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, we condemned references to statutory mitigating factors not raised by the evidence; however, this error does not require reversal. Combs objected neither to the instruction nor to the prosecutor's argument. In fact, defense counsel proposed an instruction listing all statutory factors; hence Combs induced any instructional deficiency that did occur. A party cannot complain about induced error. *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 31 OBR 587, 511 N.E.2d 106.
>
> Here, no miscarriage of justice, plain error, or material prejudice resulted from references to nonapplicable mitigating factors. The trial court stated twice that some mitigating factors may not be relevant and followed the neutral, statutory words in listing the factors. The prosecutor did argue that none of the statutory mitigating factors applied and did give reasons. However, the prosecutor fairly argued the case and did not try to create nonstatutory aggravating circumstances. *See State v. Roe* (1989), 41 Ohio St.3d 18, 26, 535 N.E.2d 1351, 1361; *State v. DePew, supra*, 38 Ohio St.3d at 289-90, 528 N.E.2d at 557-558.

State v. Combs, 62 Ohio St.3d at 286-87.

As the Court has stated, a federal court sitting in habeas corpus must defer to the Ohio Supreme Court's interpretation and application of Ohio law. *Wainwright v. Goode,* 464 U.S. at 84. The Ohio Supreme Court concluded that the trial court did not violate Ohio law by

instructing the jury as to all of the statutory mitigating factors.

Petitioner has not demonstrated that the trial court's action implicated any constitutional right. The Court assumes that Petitioner bases this claim upon his belief that the trial court deprived him of a fundamentally fair trial in violation of the due process clause. This Court disagrees.

The instruction that the trial court gave clearly explained to the jury its responsibility in sentencing Petitioner. Nothing in the trial court's instructions had the potential for confusing the jury with respect to the mitigating factors argued by Petitioner or the jury's task with respect to weighing the mitigating factors against the aggravating circumstances. The mere fact that the trial court informed the jury that other statutory mitigating factors exist did not deprive Petitioner of a fundamentally fair trial. For those reasons, Petitioner's Thirteenth Claim for Relief is **DENIED**.

6. Sixteenth Claim for Relief. **The trial court improperly instructed the jury on consideration of sympathy.**

Petitioner contends that the trial court erred by instructing the jury that it was not to be swayed by feelings of sympathy. Petitioner contends that the trial court's error was compounded by the prosecution's comments concerning sympathy in its closing argument.

The Ohio Supreme Court addressed this claim as follows:

> Since Combs did not object at trial nor raise the issue before the court of appeals, waiver applies. That instruction fails to qualify as plain error

> because the outcome of the trial was not affected. *State v. Long, supra*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804; *State v. Williams, supra*, 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364.
>
> Moreover, considered as a whole, the instructions adequately informed the jury of its responsibility to consider all the defense's mitigating evidence. *See California v. Brown* (1987), 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934, 942 (O'Connor, J., concurring). An instruction to exclude bias, sympathy or prejudice ensures that sentencing is based on reviewable guidelines, not a juror's personal bias or sympathy. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph three of the syllabus; *State v. Steffen, supra*, 31 Ohio St.3d at 125, 31 OBR at 285, 509 N.E.2d at 396. Requiring that capital sentencing be based on sympathy that jurors feel for an accused would be a new constitutional rule applying the Eighth Amendment. *Saffle v. Parks* (1990), 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415.

State v. Combs, 62 Ohio St.3d at 288-89.

Petitioner contends that the trial court should also have instructed the jury that it could be merciful. He bases that contention upon his reading of *Woodson v. California*, 428 U.S. at 304, in which the Supreme Court concluded that

> [c]onsideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. *See Williams v. New York*, 337 U.S., at 247-249, 69 S.Ct., at 1083-1084; *Furman v. Georgia*, 408 U.S., at 402-403, 92 S.Ct.,

> at 2810-2811 (Burger, C.J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, *see Trop v. Dulles*, 356 U.S., at 100, 78 S.Ct., at 597 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Petitioner's claim finds no support *in Woodson*. *Woodson* does not, as Petitioner suggests, mandate that a trial court inform a jury in sentencing that it may show mercy toward the defendant. Rather, *Woodson* requires individualized, as opposed to mandatory, sentencing in capital cases. Petitioner's sentencing was individualized in the sense intended by *Woodson*.

The Supreme Court's decision in *Saffle v. Parks*, 494 U.S. 484, 488-90 (1990), is instructive:

> Relying upon our decisions in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), . . . Parks argues that the Eighth Amendment . . . requires . . . that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence. We disagree and conclude that adoption of this principle would create a new rule as defined in *Teague [v. Lane*, 489 U.S. 288 (1989)] and *Penry [v. Lynaugh*, 492 U.S. 302 (1989)].

In *Lockett*, a plurality of the Court decided that an Ohio death penalty statute that limited the jury's consideration to specified mitigating circumstances violated the constitutional requirement of individualized sentencing in capital cases. *See* 438 U.S., at 605, 98 S.Ct., at 2965. The plurality based its conclusion on the view that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604, 98 S.Ct., at 2964-2965 (emphasis in original; footnotes omitted).

In *Eddings*, the view adopted by the *Lockett* plurality ripened into a holding of the Court. We ruled that a sentencing judge's refusal, as a matter of law, to consider mitigating evidence presented by a capital defendant concerning his family history and upbringing was constitutional error. Relying on the plurality opinion in *Lockett*, the Court reasoned:

Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a *matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed the jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

In Petitioner Combs' case, the trial court did not exclude from the jury's consideration any evidence proffered by Petitioner in mitigation. Petitioner contends that the trial court should have instructed the jury that it could, in mercy, decline to sentence Petitioner to death. That proposition is not supported by the Supreme Court's holding in *Saffle*, which requires only that the trial court not exclude from the jury's consideration any relevant evidence proffered by the defendant in mitigation. Moreover, Petitioner's proposition is not suggested by either *Saffle* or *Woodson*, inasmuch as those decisions address the consideration of evidence in support of mitigation. Petitioner's claim is not based upon the exclusion of any relevant mitigating evidence. The Court concludes that Petitioner has not established a violation of a constitutional right, and his Sixteenth Claim for Relief is **DENIED**.

7. Twenty-First Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to object to the trial court's instructions regarding Petitioner's statement to police.**

The Court has previously addressed Petitioner's Fourth Claim for Relief pursuant to which he asserted that the trial court erred by admitting his "talk to . . . my lawyer" statement to Officer Ventre and by instructing the jury that it could consider the statement as evidence with respect to the aggravating circumstances. Pursuant to this claim, Petitioner asserts that his trial counsel was constitutionally ineffective in failing to object to the admission of the statement and to the trial court's instruction to the jury.

The Ohio Supreme Court addressed this claim as follows:

> Reversal of a conviction or sentence based upon ineffective assistance requires meeting the two-prong standard of *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *Strickland* requires: (a) deficient performance, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (b) prejudice, "error * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. As to performance, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693, 104 S.Ct. 2067, 80 L.Ed.2d at 697. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. *See*, also, *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154; *State v. Hester* (1976), 45 Ohio St.2d 71, 74 O.O.2d 156, 341 N.E.2d 304.
>
> Combs first argues ineffectiveness because his counsel failed to object to his statement to the police, "talk to * * * [my] lawyer," and the jury considered that statement on the issues of intention and prior calculation and design. However, the Constitution does not guarantee an error-free trial. "[T]he Constitution guarantees

> criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac* (1982), 456 U.S. 107, 134, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783, 804.
>
> Even if counsel performed deficiently, Combs was not prejudiced by the evidence or the instruction. Combs' identity as the killer was not an issue, and the evidence of purposefulness and prior calculation and design was otherwise compelling. As discussed in Part I, no reasonable probability exists that the result of the trial would have been different because of counsel's failure to object. *See Strickland v. Washington, supra*, 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 696; *State v. Bradley, supra.*
>
> * * *
>
> Combs further argues that his counsel's failure to move to suppress his confession constituted ineffective assistance. However, defense counsel had no basis on which to suppress this statement. *Colorado v. Connelly, supra*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473. Moreover, the admission of the statement made no difference at trial since Combs' identity as the killer was not an issue.

State v. Combs, 62 Ohio St.3d at 289-90.

In order to establish that he is entitled to have his conviction and sentence set aside on the basis of ineffective assistance of counsel, Petitioner must satisfy the following standards:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Here, Petitioner has failed to demonstrate that his trial counsel's performance was deficient. There is no evidence that trial counsel failed to perform at a reasonable level for counsel in a capital trial. Further, as the Court has previously concluded, the admission of the statement and the trial court's instruction were not so prejudicial to Petitioner, in the absence of any serious question as to his identity as the murderer of Peggy and Joan Schoonover, that the Court could conclude that the asserted errors by counsel deprived Petitioner of a fundamentally fair trial. Accordingly, Petitioner's Twenty-First Claim for Relief is **DENIED**.

8. Twenty-Third Claim for Relief. **Petitioner Combs' trial attorneys rendered grossly ineffective and inadequate representation during the trial's culpability phase by failing to present blood test evidence.**

Petitioner Combs contends that his trial counsel failed to present evidence of blood tests that were performed immediately after the shooting and that counsel further erred by failing to introduce evidence of the fact that other drug tests were not performed. The

Ohio Supreme Court concluded that the trial court had properly excluded the only blood test results Petitioner attempted to introduce. *State v. Combs*, 62 Ohio St.3d at 284. Pursuant to his Twenty-Third Claim for Relief, Petitioner apparently contends that counsel should have introduced evidence to show that the only blood test ever administered was administered immediately after the shooting and that the test results in Petitioner's possession must, therefore, have been the results of that test.

The Court recognizes that introduction of such evidence might have persuaded the trial court to admit the test results. Petitioner has not, however, identified the manner in which he would have established, through evidence, that only one blood test was ever administered. He has not introduced evidence in this proceeding from which the Court can ascertain that only one blood test was administered. Indeed, in order to establish that point, Petitioner may have been required to testify.

Even had Petitioner introduced evidence that tended to show that only one blood test was ever administered, the trial court may have excluded the proffered test results for the same reasons that they were rejected at trial. They bore no indicium of the date upon which the test was administered and were not self-explanatory. In other words, the Court does not conclude that the test results would necessarily have been admitted had trial counsel performed in the manner now suggested by Petitioner.

The Court further concludes that, even were Petitioner able to establish conclusively that the test results would have been admitted had counsel introduced all available evidence concerning those results, Petitioner

could not establish that he is entitled to the relief he requests. Pursuant to the *Strickland* standard set forth above, Petitioner would be required to establish both (1) that counsel's performance was deficient to the extent that Petitioner was denied the assistance of counsel encompassed by the Sixth Amendment and (2) that he was prejudiced as a result of counsel's performance.

In Petitioner's case, trial counsel introduced substantial evidence of Petitioner's consumption of alcohol and drugs on the day of the murders of Peggy and Joan Schoonover. Petitioner cannot claim that, by failing to ensure the admission of the blood test results, counsel failed to present a cogent intoxication defense. Indeed, Dr. Fisher testified that he believed that Petitioner was "under the influence" when he committed the charged offenses. That testimony was buttressed by substantial other evidence. Petitioner has not demonstrated that the admission of the blood test results would have tipped the scales in his favor with regard to the intoxication defense. Accordingly, the Court concludes that counsel's performance was not so deficient that Petitioner was denied his Sixth Amendment right to counsel. The Court further concludes that Petitioner was not prejudiced by the failure of his counsel to introduce additional evidence concerning blood tests administered or not administered. His Twenty-Third Claim for Relief is **DENIED**.

9. Fortieth Claim for Relief. **The Ohio appellate courts denied an adequate remedy for Petitioner's ineffective appellate representation.**

The substance of this claim is addressed above in the subsection of this Opinion and Order addressing Petitioner's Thirty-Ninth Claim for Relief. There, the Court identifies, at length, the remedies that were available to Petitioner for the alleged ineffectiveness of

appellate counsel. For the reasons set forth there, Petitioner's Fortieth Claim for Relief is **DENIED**.

10. Forty-Fifth Claim for Relief. **The prosecution improperly cited victim impact evidence during trial.**

Petitioner Combs contends that the prosecution improperly injected victim impact evidence into the trial. The "evidence" to which Petitioner refers is actually in the form of references by the prosecution to other acts of abuse by Petitioner against Peggy Schoonover, a request by the prosecution that the jury impose the death penalty on behalf of the victims' families, and a reference to the desperation of the victims and the horror that surrounded the crimes. Petitioner contends that such "evidence" was not admissible in Ohio at the time of the offenses for which he was charged.

Petitioner raised only the claims concerning the prosecution's references to the desperation of the victims and the impact of the victims' deaths on their families on direct appeal. In its analysis of Petitioner's Forty-Fourth Claim for Relief, above, this Court noted that Petitioner had raised a claim concerning the prosecution's introduction of evidence of prior acts of abuse postconviction before the courts of Ohio. That claim was deemed barred by the doctrine of *res judicata*. This Court concluded that Petitioner had not demonstrated cause for his failure to raise the claim on direct appeal or resulting prejudice.

The Ohio Supreme Court addressed the portion of this claim that was raised on direct appeal as follows:

> Combs did not object at trial, and "[a] claim of error in a criminal case can not be predicated upon the improper remarks of counsel during his

argument at trial, which were not objected to, unless such remarks serve to deny the defendant a fair trial." *State v. Wade, supra*, 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244, paragraph one of the syllabus. Accord *Scott v. State* (1923), 107 Ohio St. 475, 141 N.E. 19, at paragraph two of the syllabus; Crim.R. 52(b).

In his remarks, the prosecutor speculated at length about what Joan and Peggy thought as Combs confronted them, chased them in his car, and shot them. The following illustrates:

"* * * Can you imagine the terror of that? A gun right to your head, was she [Joan] thinking of her husband, who was going to take care of him? Was she thinking about her childhood? Was she thinking about her daughter take me but spare Peggy? That's the aggravating circumstance, what she went through. Or maybe she started to pray, we don't know. He won't tell us. * * * What went through her [Peggy's] mind, what was she thinking? Was she thinking of little Joey, who's going to take care of him, grandma is gone, I'm going to be gone, who's going to raise my little boy. And then comes the pull of that second trigger, and she's gone. That's the aggravating circumstance. * * * What weighs more, these two totally good lives or the defendant's life in the fast lane? * * *"

After reading his entire argument, we conclude that the prosecutor did err. The prosecutor did improperly suggest that how the victims were killed and the suffering and mental anguish the victims endured was an aggravating circumstance. Improperly injecting nonstatutory aggravating circumstances is error. *See State v. Davis* (1988), 38 Ohio St.3d 361, 367, 528 N.E.2d 925, 931. By

> continually referring to what the victims were thinking, the prosecutor engaged in gross speculation. However, the mention of the victims' personal situations and their relatives did not violate the Constitution. *Payne v. Tennessee* (1991), 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 270, overruling *Booth v. Maryland* (1987), 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989), 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876. Moreover, the prosecutor could legitimately refer to the nature and circumstances of the offense, both to refute any suggestion that they were mitigating and to explain why the specified aggravating circumstance, a course of conduct to kill two or more persons, outweighed mitigating factors. *See State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus; *State v. Lott* (1990), 51 Ohio St.3d 160, 171, 555 N.E.2d 293, 305.
>
> Although error, the prosecutor's sentencing comments did not rise to the level of plain error. The prosecutor's argument made no crucial difference, and Combs received a fair trial. No miscarriage of justice resulted from a death sentence, given the aggravating circumstance and the lack of any significant mitigating factors. Moreover, our independent reassessment of the sentencing evidence will cure the effect of this error. *See State v. Landrum* (1990), 53 Ohio St.3d 107, 124, 559 N.E.2d 710, 729; *State v. Lott*, *supra*, 51 Ohio St.3d at 170, 555 N.E.2d at 304.

State v. Combs, 62 Ohio St.3d at 282-83.

In *Booth v. Maryland*, 482 U.S. 496 (1987), the United States Supreme Court held that the use of victim impact evidence in the penalty phase of a capital trial violates the defendant's rights under the Eighth Amendment. The reasoning in Booth was extended to prosecutorial comments regarding victim impact in *South Carolina v. Gathers*, 490 U.S. 805 (1989).

After Petitioner's trial, the United States Supreme Court reexamined the constitutional implications of victim impact statements in *Payne v. Tennessee*, 501 U.S. 808 (1991). In *Payne*, the Supreme Court overruled *Booth* and *Gathers* and concluded that the Eighth Amendment erects no *per se* bar to the state's introduction of victim impact evidence, including evidence about the impact of the offense on the victim's family, and prosecutorial argument on that subject. *Id.* at 827. The Court stated that it was "now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.* at 825. The Court further concluded that the state has a legitimate interest in counteracting the evidence presented in mitigation with evidence demonstrating that the victim, as well as the defendant, should be viewed as an individual. *Id.* The Court also noted that where "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.*

Comments concerning the impact of an offense upon the victim are now subject to review under the due process analysis utilized in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). A prosecutor's comments must be viewed in context, and inappropriate prosecutorial

comments, standing alone, will not justify reversal of a criminal conviction obtained in an otherwise fair proceeding. *United States v. Young*, 470 U.S. 1, 11-12 (1985); *United States v. Bond*, 22 F.2d 662, 667 (6th Cir. 1994). The comments must also be viewed in light of any comments made by defense counsel as well as the nature of the prosecution's response. *Bond*, 22 F.3d at 667. Under the "invited response" doctrine, where the prosecutor's improper comments were made in response to the arguments of defense counsel, the prosecutorial misconduct is not excused, but the allegations of a due process violation are diminished. *Cook v. Bordenkircher*, 602 F.2d 117, 119 (6th Cir.), *cert. denied*, 444 U.S. 936 (1979).

The Sixth Circuit has employed a four factor test in habeas proceedings for determining whether the prosecutor's conduct was so egregious as to render the trial fundamentally unfair:

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury; and the strength of the competent proofs introduced to establish the guilt of the accused.

Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990) (quoting *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976)); *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982). The court in *Sizemore*, 921 F.2d at 670, recognized that "prosecutors must enjoy considerable latitude in presenting arguments to a jury, and that reversal of a conviction should not be ordered when a prosecutor's behavior, even though inappropriate, has not resulted in

prejudicial error."

The remarks at issue here were made in response to the evidence presented by Petitioner in mitigation, not to inflame or mislead the jury. They were not extensive in relation to the prosecutor's argument as a whole. The evidence supporting Petitioner's conviction on the aggravating factors was overwhelming, and the evidence presented on the issue of mitigation was weak. The comments concerning the impact of the homicide on the homicide victims and their families were relevant to the issue of mitigation. The Court concludes that the comments regarding the impact of the murder on Peggy and Joan Schoonover and their families were not improper under *Payne* and that, in any event, Petitioner was not prejudiced by the comments in light of the strength of the evidence in support of aggravating circumstances and the weakness of Petitioner's mitigation case. Petitioner's Forty-Fifth Claim for Relief is **DENIED**.

11. Forty-Ninth Claim for Relief. **Petitioner Combs' death sentence is disproportionate to other Hamilton County sentences.**

Fiftieth Claim for Relief. **Ohio's proportionality review process is flawed.**

Petitioner contends that his sentence is disproportionate when viewed in light of other sentences imposed in Hamilton County cases in which defendants were eligible to be sentenced to death. He further contends that Ohio's system for proportionality review is flawed. The Ohio Supreme Court addressed these claims as follows:

> Combs' arguments lack merit. Proportionality review is not constitutionally required. *Pulley v. Harris* (1984), 465 U.S. 37, 50, 104 S.Ct. 871, 879, 79 L.Ed.2d 29, 40; *State v. Jenkins, supra*, at 176, 15 OBR at 321, 473 N.E.2d at 278. The proportionality review mandated in R.C. 2929.05 "is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *State v. Steffen, supra*, paragraph one of the syllabus.

State v. Combs, 62 Ohio St.3d at 289.

At the outset, this Court observes that a proportionality review of Petitioner's sentence is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 45 (1984). Ohio, however, has chosen to require its appellate courts to review a judgment in a capital case to determine whether a death sentence is appropriate. Section 2929.05(A) of the Ohio Revised Code provides, in pertinent part, as follows:

> Whenever sentence of death is imposed. . . the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the

> sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. . . . The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

In Ohio, the reviewing court has available to it data documenting all capital indictments within the jurisdiction, including information about whether or not a plea was entered, whether the indictment was dismissed or a verdict was returned and sentence imposed. *State v. Jenkins*, 15 Ohio St.3d 164, syllabus (1984), *cert. denied*, 472 U.S. 1032 (1985). An appellate court satisfies O.R.C. §2929.05(A) by comparing the case under review to other cases in which it has imposed the death penalty. *State v. Steffen*, 31 Ohio St.3d 111, 123-25 (1987), *cert. denied*, 485 U.S. 916 (1988). By requiring such a review, the Ohio death penalty scheme provides a safeguard against arbitrarily imposed death sentences. *Pulley v. Harris*, 465 U.S. at 50.

In the instant case, the Ohio Supreme Court conducted a proportionality review of Petitioner Combs' death sentence and concluded that it was neither disproportionate nor inappropriate. *State v. Combs*, 62 Ohio St.3d at 294. In doing so, the court compared Petitioner's sentence to similar cases in which the death penalty was imposed. *Id.* The Court concludes that the Constitution is not violated where Ohio decides the method of reporting and comparing capital cases under its

system of proportionality review. Petitioner's Forty-Ninth and Fiftieth Claims for Relief are **DENIED**.

12. Fifty-Second Claim for Relief. **The Ohio death penalty scheme is unconstitutional.**

Pursuant to his Fifty-Second Claim for Relief Petitioner attacks Ohio's death penalty scheme on various constitutional grounds. The Ohio Supreme Court addressed this claim as follows:

> Combs failed to challenge the statute on many of these issues at trial. By failing to do so, he waived any constitutional objection on those grounds. *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, syllabus; *State v. Greer* (1988), 39 Ohio St.3d 236, 244, 530 N.E.2d 382, 394. Moreover, we have consistently rejected all of Combs' arguments. *See State v. Beuke* (1988), 38 Ohio St.3d 122, 132, 529 N.E.2d 913, 923; *State v. Sowell, supra*, 39 Ohio St.3d at 336, 530 N.E.2d at 1309.

State v. Combs, 62 Ohio St.3d at 291.

Petitioner Combs contends that the Ohio death penalty scheme allows for the imposition of the death penalty in an arbitrary and discriminatory manner. He does not elaborate, however, except to the extent that he contends that the scheme has resulted in the imposition of the death penalty in a racially discriminatory manner.

Petitioner recites statistics which he insists demonstrate that the death penalty is applied in a discriminatory manner, and therefore, his death sentence as well is unconstitutional. Petitioner asserts that, in Hamilton County, black defendants and those who

murder white people are more likely to receive the death penalty than white defendants and those who murder black people. He apparently believes that, even though he is white, he has standing to claim a denial of equal protection when members of another race have been the victims of discrimination.

The United States Supreme Court has rejected such arguments by defendants sentenced to death. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court held that an inmate attacking his capital sentence must show that the jury in his case was motivated by a discriminatory purpose.

> Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." *Whitus v. Georgia*, 385 U.S. 545, 550 (1967). A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. *Wayte v. United States*, 470 U.S. 598, 608 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with a discriminatory purpose.

McCleskey, 481 U.S. at 292 (emphasis in original)(footnote omitted). As proof of discrimination, McCleskey offered a scientific study that showed that "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." *Id.* at 291. For several reasons, not the least of which was the fact that McCleskey committed a crime for which the United States Constitution and state laws

permit imposition of the death penalty, the Court rejected McCleskey's argument, finding that the study was "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose." *Id.* at 297. Further, McCleskey "offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." *Id.* at 292-293.

In the present case, Petitioner also offers no evidence that would support an inference that the trial court, the prosecution, or the jury acted with a discriminatory purpose in imposing the death penalty in his case. He cites to statistics that indicate that black defendants and murderers of white people receive the death penalty more often than white defendants and those who murder black people. He also argues that "no less that ten defendants who were indicted and convicted of aggravated murder in the commission of aggravated robbery in Hamilton County, alone, . . . were capitally eligible but not capitally charged." This argument is without merit as well.

In *McCleskey*, the Court ruled that "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." *McCleskey*, 481 U.S. at 306-307 (emphasis in original). The Court explained as follows:

> In *Gregg*, the Court confronted the argument that "the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law,"428 U.S. at 199, specifically the opportunities for discretionary leniency, rendered the capital sentences imposed arbitrary

and capricious. We rejected this contention:

> "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particular circumstances of the crime and the defendant."

McCleskey, 481 U.S. at 307 (quoting *Gregg v. Georgia*, 428 U.S 153, 199 (1976)). Like McCleskey, Petitioner's sentence was imposed under procedures that focus discretion "on the particular nature of the crime and the particularized characteristics of the individual defendant." *Gregg*, 428 U.S. at 206.

Because Petitioner has failed to offer any evidence regarding discriminatory purpose on the part of the decisionmakers in his case, his argument based on statistics surrounding the imposition of the death penalty in Hamilton County fails. Accordingly, the Court concludes that Petitioner was not denied equal protection of the law when he received the death sentence.

Petitioner Combs further contends that Ohio's death penalty scheme violates the Constitution, presumably the due process clause, inasmuch as it does

not ensure that the least severe effective penalty will be imposed. Rather, Petitioner observes, the process permits the sentencer to impose only the death penalty when aggravating circumstances outweigh mitigating factors.

The United States Supreme Court has held that imposition of the death penalty as punishment for murder does not violate the Federal Constitution. *Gregg v. Georgia*, *supra*; *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Gregg*, the Court concluded that imposition of the death sentence as punishment for murder was not without justification and, therefore, was not unconstitutional. *Gregg*, 428 U.S. at 187.

The Court in *Gregg* based its conclusion on several grounds. The Court first noted that the death penalty was considered permissible by the framers of the Constitution and that the death penalty might serve "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Id.* at 183. The Court further concluded that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* at 184. The Court also found that the value of capital punishment as a deterrent to crime is a "complex factual issue" that legislatures, not the courts, are better suited to address. *Id.* at 186. Thus, this Court concludes for the reasons cited in *Gregg* that Ohio's imposition of the death penalty as punishment for murder does not violate Petitioner's due process rights.

Petitioner argues that the Ohio death penalty scheme fails to allow the capital defendant to prove the existence of mitigating factors by less than a

preponderance of the evidence and that it does not require the state to prove the absence of any mitigating factors. In regard to the first portion of his argument here, Petitioner cites *State v. Jenkins*, 15 Ohio St.3d at 171, in which the Ohio Supreme Court held that capital defendants must prove the existence of mitigating factors by a preponderance of the evidence. He contends that this standard of evidence precludes the sentencer from giving weight and effect to mitigating evidence that, while not satisfying this standard, may still be considered as a basis for a lesser sentence than death.

As a threshold matter, this Court notes that a state is not prohibited from requiring that a capital defendant prove the existence of mitigating factors by a preponderance of the evidence. *See Walton v. Arizona*, 497 U.S. 639, 649-650 (1990). In any event, the Ohio death statutes do not require that a defendant must prove the existence of mitigating factors by a preponderance of the evidence.

Section 2929.03(D)(1) of the Ohio Revised Code provides, in pertinent part, as follows:

> The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

Section 2929.04, which sets forth the criteria for establishing mitigating factors, provides in subdivision

(C) as follows:

> The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The plain language of these statutes does not require the defendant to prove the existence of mitigating circumstances by a preponderance of the evidence.[5] Pursuant to O.R.C. §2929.03(D)(1), the only burden imposed upon the defendant is one of going forward with evidence of mitigating factors. In his state court trial, the trial judge gave an appropriate instruction to the jury:

> The State of Ohio seeks a finding that the sentence of death be imposed upon the defendant Ronald Dean Combs. Before you can make such finding the State has the burden of proving beyond a reasonable doubt that the aggravating circumstances set forth in specification 1 to count 1 or specification 1 to count 2 of the indictment which the defendant has been found guilty of committing is sufficient to outweigh the factors in mitigation.

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[5] In *State v. Lawrence*, 541 N.E.2d 451, 455-56 (Ohio 1989), the Ohio Supreme Court declined to reconsider its decision in *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (Ohio 1984), but stated that a jury instruction that closely tracks O.R.C. §2929.03(D)(1) and does not impose the burden of proving the existence of mitigating factors by a preponderance of the evidence on the defendant would be permissible in an Ohio capital trial.

> The State of Ohio is limited by statute in its presentation of the evidence to the aggravating circumstance of which the defendant has already been convicted. The defendant has no burden of proof and no such limitation.

Transcript, p.1428. Indeed, this Court's review of the trial court's jury instructions does not indicate that any instruction was given to the jury requiring that Petitioner prove the existence of mitigating factors by a preponderance of the evidence. Thus, the Ohio death penalty scheme on its face, and as applied to Petitioner, does not require proof of mitigating factors by a preponderance of the evidence.

The Court now turns to the second part of Petitioner's argument, namely, that the Ohio scheme does not require the state to prove the absence of mitigating factors. The United States Supreme Court has set forth the requirements for a constitutionally permissible allocation of the burden of proof as follows:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Walton v. Arizona, 497 U.S. at 650.

Section 2929.03(D)(1) of the Ohio Revised Code complies with *Walton* inasmuch as it does not lessen the state's burden to prove any elements of the offense charged or the existence of aggravating circumstances. *Walton* identifies no constitutional requirement that the

state prove the absence of mitigating factors. Accordingly, this Court concludes that O.R.C. §§2929.03 and 2929.04 do not violate the United States Constitution.

Petitioner's contention that Ohio's capital sentencing scheme is unconstitutional in that it fails to require a proper method for weighing aggravating circumstances and mitigating factors is also unavailing. A specific method of balancing aggravating against mitigating circumstances is not constitutionally required. *Zant v. Stephens*, 462 U.S. 862, 876 n.13 (1983) (citing *Jurek v. Texas*, 428 U.S. 262, 270 (1976)); *Briley v. Bass*, 750 F.2d 1238, 1244-45 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985).

The Constitution also does not require that a jury find that aggravating circumstances substantially outweigh mitigating factors before it imposes the death penalty. Petitioner's contention to the contrary is baseless.

Since the United States Supreme Court's ruling in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has held that a capital sentencing authority's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. at 188; *Zant v. Stephens*, 462 U.S. at 874. In *Gregg*, the Court explained that Furman required that a capital jury be given adequate information and provided with standards to guide it in deciding whether to impose the death penalty. *Id.* at 195. The Georgia capital sentencing procedure at issue in *Gregg*, which required the jury's consideration of aggravating circumstances and mitigating factors before imposing the death penalty, was upheld as constitutional because those procedures guided the discretion of the jury. *Id.* at 206. Similarly, in *Proffitt v. Florida*, 428 U.S. 242 (1976), the Court upheld the

Florida capital sentencing procedure because it required that the trial judge weigh aggravating factors against mitigating factors before imposing the death penalty. In holding that the Florida statute complied with the requirements of *Furman*, the Court in *Proffitt* stated as follows:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Id. at 258. Thus, while condemning "total arbitrariness and capriciousness" in the imposition of the death penalty, the Supreme Court has never concluded that the Constitution requires that the death penalty only be imposed when aggravating circumstances are found to substantially outweigh mitigating factors.

In Ohio, O.R.C. §2929.03 governs the capital sentencing procedure required to impose the death penalty. Subdivisions (D)(2) and (3) of that statute provide, in pertinent part, as follows:

> the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of

> committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender.
>
> * * *
>
> . . . if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender.

The aggravating circumstances and mitigating factors a jury or judge must consider are enumerated in O.R.C. §2929.04. The Ohio capital sentencing procedure thus requires that a jury or judge evaluate specific factors and weigh them in a manner similar to the procedures upheld in *Gregg* and *Proffitt*. *See also State v. Buell*, 22 Ohio St.3d 124 (Ohio and Florida capital sentencing procedures compared), *cert. denied*, 479 U.S. 871 (1986). That procedure does not, therefore, run afoul of the United States Supreme Court's interpretations of the Constitution.

Petitioner finally contends that Ohio's death penalty scheme runs afoul of the United States Supreme Court's pronouncements in *Woodson v. North Carolina*, 428 U.S. 280 (1976). Specifically, Petitioner contends that, by combining the jury's consideration of the defendant's guilt and its consideration of the aggravating circumstances, Ohio's scheme violates the defendant's constitutional rights.

In *Woodson*, the Supreme Court considered a scheme that allowed for mandatory capital punishment

for first degree murder. In an opinion joined by two other justices, Justice Stewart concluded that

> North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences. Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in Furman by resting the penalty determination on the particular jury's willingness to act lawlessly. While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process of imposing a sentence of death.

Id. at 303.

Justice Stewart further opined that a permissible scheme

> requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Id. at 304.

Petitioner has not identified the manner in which Ohio's capital sentencing scheme runs afoul of those

pronouncements, notwithstanding the jury's consideration of the charges and the aggravating circumstances simultaneously. Ohio's scheme does not permit the arbitrary, capricious, or wanton imposition of the death penalty. Moreover, it requires consideration of the individual of the defendant by requiring consideration of any evidence relevant to mitigation introduced by the defendant. The Court concludes that Ohio's scheme suffers from none of the infirmities identified in *Woodson*.

IV. Conclusion

For the reasons set out above, the petition for writ of habeas corpus is hereby **DENIED**. The stay of execution entered September 5, 1995, is hereby **VACATED**.

IT IS SO ORDERED.

Sandra S. Beckwith
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-95-733

RONALD DEAN COMBS, Petitioner

v.

CARL ANDERSON, WARDEN, Respondent.

Filed: October 23, 1997

JUDGMENT

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that the petition for writ of habeas corpus is DENIED. The stay of execution entered September 5, 1995 is VACATED.

Date: October 23, 1997 Kenneth J. Murphy, Jr.
Clerk

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OHIO

Case No. 90-1868

THE STATE OF OHIO, Appellee,

v.

COMBS, Appellant.

Submitted: September 11, 1991

Decided: December 18, 1991

Around 4:00 p.m. on July 15, 1987, Peggy Schoonover and her mother, Joan Schoonover, left work near Fourth and Sycamore Streets in downtown Cincinnati. Father Robert Horine, an Episcopal priest and co-worker, saw a red car[1] speed through the intersection and come to a screeching halt, just missing him. Peggy told Father Horine she knew the driver of the red car and that she was ready for him, showing Father Horine a can of mace. Joan and Peggy then got into Joan's gray-blue Cougar and drove away.

Moments later, at an exit ramp near West Eighth Street and Linn Street, Robert Scalf saw a "brown Nova" blocking a gray Cougar. The "Nova" pulled forward and let the Cougar escape, and the "Nova" then drove backwards down an exit ramp, turned completely around, and chased the Cougar.

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[1] Identified later in testimony as defendant Combs' automobile and variously described in testimony as red or brown, and as a Nova, although it was an Oldsmobile.

Shortly thereafter, at Eighth and Linn, John Hughes saw a Cougar and a brown car, tires screeching, speed into the Holiday Park Tower parking lot. The brown car blocked the Cougar and later pulled alongside. The driver of the Cougar, a woman, was hollering, waving her hands, and honking the horn. Hughes saw a man get out of the brown car and hit the Cougar's passenger window three or four times with a shotgun, knocking out the glass. This man then put the shotgun up to his shoulder and fired twice into the Cougar. Thereafter, the man got back into his car, and Hughes saw a deputy sheriff, shouting, run up behind the Cougar.

Deputy Sheriff James Neil jogged over to where two cars had raced into the Holiday Park Tower parking lot. When he arrived, he saw Ronald Dean Combs, defendant-appellant, holding a long gun, fire two shots through the passenger window of a Cougar. Combs then returned to his red car and got in, but left the door open. Neil shouted five or six times to Combs to "freeze, halt, stop." Combs responded, "You are going to have to shoot me or you are going to have to kill me."

Combs made "an aggressive move,"and Neil shot at Combs twice. Combs, still holding the shotgun, got out of his car and faced Neil. Neil shot at Combs four more times, then retreated to reload.

Before Neil returned, Cincinnati police officer Douglas Ventre arrived and found Combs, wounded, sitting on the ground, but holding a shotgun. He ordered Combs to drop the shotgun, but Combs raised the shotgun towards Ventre, then "ran out of gas" and lowered the shotgun into his lap. Ventre ran to Combs, grabbed the shotgun, pulled it away, and asked Combs what happened. Combs replied, "the guy shot me." Later, as

Combs was placed into an ambulance, Ventre again asked what happened. Combs "told me to talk to his lawyer."

Medical personnel and Ventre found three live shotgun shells taped to Combs' body. When asked his name, Combs replied "Doc Holiday." Combs was abusive, nasty, and uncooperative with responding medical personnel, but he did not appear to be under the influence of alcohol. His eyes looked clear, pupils were reactive, and his speech appeared normal.

Combs underwent extensive treatment for his gunshot wounds. His right arm was amputated above the elbow, his left was partly paralyzed. Early the next morning, after an operation, Combs asked a nurse what had happened to "the two bitches that I shot." When Leigh Ann Wright, a recovery room nurse, told Combs, "they're dead," Combs responded, "serves the Goddamned whores right." Peggy had been Combs' girlfriend.

Police found Joan and Peggy dead from shotgun wounds to the right side of their heads. At trial, Combs did not contest that he fired the two fatal shotgun blasts.

To support prior calculation and design, the prosecutor presented evidence of Combs' efforts to obtain a shotgun on the day of the murders. Combs asked to borrow a shotgun from Anthony Liming, his fifteen-year-old cousin. Tony had none, so they both drove to Mt. Orab, over forty miles away, and Combs asked Tim Liming, Tony's uncle, to lend him a shotgun. Tim refused, and ultimately Combs used a shotgun stolen from the house of Richard Liming, Tony's father. When Combs got the shotgun, at about 3:00 p.m., he drove at high speed back to Cincinnati.

At trial, Combs argued he was too intoxicated from alcohol, marijuana, and pills to formulate the intention to kill Joan and Peggy or to plan and calculate their deaths.

Michael Eversoll, Combs' cousin, testified that on July 13, Combs started drinking heavily, smoking marijuana, and taking pills, and continued to do so through noon, July 15. Two witnesses, Tony and Tim Liming, saw Combs drink, smoke marijuana, or take pills on the afternoon of July 15. Tim Liming described Combs' eyes as glassy and his face as waxy. Combs' sister, who saw Combs around noon on July 15, and a neighbor, who saw Combs between 1:00 and 2:00 p.m., thought he was definitely under the influence of drugs and alcohol.

Dr. Roger Fisher, a clinical psychologist, found that Combs had a history of severe drug addiction. Dr. Fisher believed that Combs' judgment was substantially impaired and that he was under the influence of drugs and alcohol when he killed Joan and Peggy. However, Fisher agreed that Combs "was acting intentionally and purposefully."

A jury convicted Combs of two counts of aggravated murder. Each count contained a death penalty specification alleging a course of conduct to kill two persons, along with a gun specification. Following the jury's recommendation, the trial judge sentenced Combs to death on each murder count. Combs was also sentenced to two three-year terms on the firearm specifications. The court of appeals affirmed the convictions and death sentences.

The cause is now before this court upon an appeal as of right.

Arthur M. Ney, Jr., Pros. Atty. and *Christian J. Schaefer*, Cincinnati, for appellee.

H. Fred Hoefle and *Chuck R. Stidham*, Cincinnati, for appellant.

MOYER, C.J. We have reviewed Combs' fifteen propositions of law, independently assessed the evidence relating to the death sentences, balanced the aggravating circumstance in each count against the mitigating factors, and compared the sentence to those imposed in similar cases. As a result, we affirm the convictions and two death sentences.

I

Pretrial Statement about Lawyer

In his first proposition of law, Combs argues that the admission of his statement to Ventre, "talk to * * * [my] lawyer," was constitutional error. When that statement was admitted, the trial court instructed the jury that the defendant had a right not to speak to the police and that it not draw any inference against Combs because he exercised his rights. However, the judge also advised the jury, "You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give to this testimony depends upon your findings and the weight that you attribute to this testimony * * *."

Combs argues egregious error because the court allowed the jury to use his exercise of a constitutional right to consult an attorney to support proof of essential elements of the crimes charged against him.

Since Combs objected neither to the evidence nor to the trial judge's sua sponte instruction, the issue must be analyzed on the basis of plain error. *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804;

State v. Wade (1978), 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244.

Courts disapprove of penalties imposed for exercising the right to remain silent and to consult an attorney. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, prohibits comments by prosecutors seeking to premise guilt findings on a defendant's failure to testify. *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91, condemned the use of post-arrest silence to impeach a defendant's trial testimony. *Wainwright v. Greenfield* (1986), 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623, and *State v. Rogers* (1987), 32 Ohio St.3d 70, 512 N.E.2d 581, reversed convictions when defendants' pretrial exercise of rights of silence and to consult attorneys was used to refute insanity pleas.

The state argues that this principle only applies when *Miranda* warnings promise no adverse consequences from silence, and here no *Miranda* warnings were given. *See Jenkins v. Anderson* (1980), 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86; *Fletcher v. Weir* (1982), 455 U.S. 603, 606, 102 S.Ct. 1309, 1311-1312, 71 L.Ed.2d 490, 494.

However, at the point when Combs was placed in the ambulance, we find that Combs was in custody and had a right to remain silent, consult a lawyer, and receive a *Miranda* warning. When he arrived at the scene, Officer Ventre personally took the shotgun from Combs; there were two women dead from shotgun blasts in the adjacent car; and Ventre had been at the scene for some ten to fifteen minutes. Ventre's questioning, without a *Miranda* warning, violated those rights. Using Combs' comment, "talk to * * * [my] lawyer," in evidence at trial also violated his rights as viewed by *Griffin v. California, supra.*

Additionally, the "talk to my lawyer" evidence does not relate to or tend to prove prior calculation and design or purposefulness. Combs' comment simply meant that he was exercising his right to counsel and nothing more. Even if this remark was initially admissible, Evid.R. 401 and 403 would otherwise invite exclusion from evidence. No justification is apparent for the instruction that the evidence related to either purposefulness or prior calculation and design. Thus, we conclude the trial court erred in allowing this remark into evidence and in instructing the jury to consider the remark in relation to purposefulness and prior calculation and design.

Nonetheless, neither the evidence nor the instruction constituted plain error. The evidence did not cause a miscarriage of justice, and neither the evidence nor the instruction produced a different result in the case. Since Combs' remark does not tend to prove either prior calculation and design or purposefulness, the jury could not have relied upon it to make those findings.

Other compelling evidence established purposefulness and prior calculation and design. Combs spent a considerable part of the afternoon of the murders searching for a shotgun. He asked two people for a shotgun, and eventually drove over eighty miles before returning to Cincinnati with a shotgun. The evidence indicates he stole the shotgun he used. After he drove back to Cincinnati, he confronted Joan and Peggy and initiated a car chase over several blocks, eventually cornering them at the Holiday Park Tower office building. He deliberately knocked out a window in their car and fired a shotgun into each woman's head at close range. Those facts alone establish both purposefulness and prior calculation and design. Thus, Combs has not shown plain error.

II

Prosecutorial Misconduct—Sentencing

In his second proposition of law, Combs argues that the prosecutor's sentencing argument improperly focused on the victims' mental anguish and suffering, thereby converting the facts of the offense into a nonstatutory aggravating circumstance. Combs contends the prosecutor also improperly focused on the suffering of the victims' family.

Combs did not object at trial, and "[a] claim of error in a criminal case can not be predicated upon the improper remarks of counsel during his argument at trial, which were not objected to, unless such remarks serve to deny the defendant a fair trial." *State v. Wade*, *supra*, 53 Ohio St.2d 182, 7 O.O.3d 362, 373 N.E.2d 1244, paragraph one of the syllabus. Accord *Scott v. State* (1923), 107 Ohio St. 475, 141 N.E. 19, at paragraph two of the syllabus; Crim.R. 52(B).

In his remarks, the prosecutor speculated at length about what Joan and Peggy thought as Combs confronted them, chased them in his car, and shot them. The following illustrates:

"* * * Can you imagine the terror of that? A gun right to your head, was she [Joan] thinking of her husband, who was going to take care of him? Was she thinking about her childhood? Was she thinking about her daughter take me but spare Peggy? That's the aggravating circumstance, what she went through. Or maybe she started to pray, we don't know. He won't tell us. * * * What went through her [Peggy's] mind, what was she thinking? Was she thinking of little Joey, who's going to take care of him, grandma is gone, I'm going to be gone, who's going to raise my little boy. And then comes the pull of that second trigger, and she's gone. That's the

aggravating circumstance. * * * What weighs more, these two totally good lives or the defendant's life in the fast lane? * * * *"

After reading his entire argument, we conclude that the prosecutor did err. The prosecutor did improperly suggest that how the victims were killed and the suffering and mental anguish the victims endured was an aggravating circumstance. Improperly injecting nonstatutory aggravating circumstances is error. See *State v. Davis* (1988), 38 Ohio St.3d 361, 367, 528 N.E.2d 925, 931. By continually referring to what the victims were thinking, the prosecutor engaged in gross speculation. However, the mention of the victims' personal situations and their relatives did not violate the Constitution. *Payne v. Tennessee* (1991), 501 U.S. —, 111 S.Ct. 2597, 115 L.Ed.2d 720, overruling *Booth v. Maryland* (1987), 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989), 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876. Moreover, the prosecutor could legitimately refer to the nature and circumstances of the offense, both to refute any suggestion that they were mitigating and to explain why the specified aggravating circumstance, a course of conduct to kill two or more persons, outweighed mitigating factors. See *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus; *State v. Lott* (1990), 51 Ohio St.3d 160, 171, 555 N.E.2d 293, 305.

Although error, the prosecutor's sentencing comments did not rise to the level of plain error. The prosecutor's argument made no crucial difference, and Combs received a fair trial. No miscarriage of justice resulted from a death sentence, given the aggravating circumstance and the lack of any significant mitigating factors. Moreover, our independent reassessment of the sentencing evidence will cure the effect of this error. See *State v. Landrum* (1990), 53 Ohio St.3d 107, 124, 559

N.E.2d 710, 729; *State v. Lott, supra*, 51 Ohio St.3d at 170, 555 N.E.2d at 304.

III
Trial Issues

A
Admission of Hospital Records

In proposition of law No. 8, Combs argues the trial judge erroneously declined to admit a hospital report reflecting the results of a blood-alcohol test. The state responds that information about this test was sketchy, that the evidence was properly excluded, and that any error was harmless.

Combs correctly points out that any information about his blood-alcohol level on the date of the offense was relevant in both the guilt and punishment phases. *State v. Sowell* (1988), 39 Ohio St.3d 322, 324, 530 N.E.2d 1294, 1299; see *Bell v. Ohio* (1978), 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010.

However, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. Even relevant evidence may be excluded, under Evid.R. 403(A), if its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

Extreme uncertainty surrounded this particular report. The only date reflected in the proffered report was January 21, 1988, which was six months after Combs' hospital admission. Combs proffered no evidence as to when or why the test was given, who gave it, or under what circumstances it was given. Thus, the test was not

admissible under the hearsay exception for business records. Combs did *not* establish that the report was made "at or near the time" of the event. Evid.R. 803(6).

Additionally, Combs proffered no explanation as to what the test results meant. As the court of appeals noted, "[t]his report reflected, without interpretation, raw data that would, by itself, have been unintelligible to the ordinary lay person." The test results could easily have been misinterpreted. Under these circumstances, the trial judge did not err in rejecting the report even though the parties agreed it was a hospital record.

Moreover, any error was harmless. Combs presented extensive evidence concerning his drinking prior to the offenses, and the prosecutor conceded that point. Thus, information about his blood-alcohol test was cumulative. Furthermore, our independent sentence reassessment will cure any error to the extent that it might affect the sentences. See *State v. Landrum, supra*, 53 Ohio St.3d 107, at 124, 559 N.E.2d 710, at 729; *State v. Lott*, *supra*, 51 Ohio St.3d 160, at 170, 555 N.E.2d 293, at 304.

B
Involuntary Confession

In proposition of law No. 9, Combs argues that his admission to nurse Wright that he shot two "bitches" or "whores" constituted an involuntary confession and hence was inadmissible. Combs argues involuntariness based on alcohol, the surgery, and the effects of drugs he was given before and after surgery.

However, Combs cannot benefit from the rule which excludes involuntary confessions. In *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, the Supreme Court refused to recognize "the right of

a criminal defendant to confess to his crime only when totally rational and properly motivated * * *." Instead, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly, supra*, at 166, 167, 107 S.Ct. at 521, 522, 93 L.Ed.2d at 484.

In this case, Combs presented no evidence of coercive police activity or police questioning. Wright simply responded to a question that Combs asked, and Combs' remarks cannot be excluded as involuntary under the Fourteenth Amendment, whatever his mental state at the time. *Colorado v. Connelly, supra.*

Even if Combs' statements were found inadmissible, reversal would not be required. Combs did not object; hence he waived all but plain error, and Combs' convictions did not rest on this confession. Combs conceded at trial that he had shot the two women, and two witnesses testified they saw him do so. Under the circumstances, the claim of plain error lacks any merit.

C

Exclusion of Prospective Juror

In proposition of law No. 10, Combs argues the trial judge improperly excluded prospective juror Ann Hagemann from the jury. When asked if she could fairly consider the death penalty, Hagemann replied, "I don't think so because I would feel like I was, you know, you are killing somebody to a degree." She also asserted that she was opposed to the death penalty.

The test for excluding prospective jurors, based on their personal views on the death penalty, "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his

instructions and oath." *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus, following *Wainwright v. Witt* (1985), 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, vacated on other grounds (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452.

Combs complains Hagemann's answers did not establish such impairment. However, Combs did not object specifically to her exclusion, nor did he seek to question her further or complain about the questions asked. Hagemann did not elaborate on her views. Under the circumstances, ambiguities can be resolved in the state's favor, and reversal is not required. *Wainwright v. Witt, supra*, 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851-852. "* * * '[D]eference must be paid to the trial judge who sees and hears the juror.' *Witt, supra*, at 426 [105 S.Ct. at 853, 83 L.Ed.2d at 853]. We will not overrule his decision absent an abuse of discretion. *State v. Wilson* (1972), 29 Ohio St.2d 203 [58 O.O.2d 409, 280 N.E.2d 915] * * *."*State v. Tyler* (1990), 50 Ohio St.3d 24, 30, 553 N.E.2d 576, 586.

IV
Other Sentencing Issues

A.
Court's Independent Assessment

In proposition of law No. 3, Combs challenges this court's authority to reassess the death penalty where the jury's deliberations are tainted by prosecutorial misconduct, injection of nonstatutory aggravating circumstances, or other error. In effect, Combs challenges *Clemons v. Mississippi* (1990), 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725, and asks that this court not implement that decision in Ohio.

We have already rejected Combs' arguments and recognized that appellate reweighing can correct errors in sentencing. "Indeed, it is within the province of this court to conduct its own careful appellate reweighing of aggravating circumstances against mitigating factors to produce a 'measured consistent application' of the death penalty which would be in no way unfair to the defendant. *Clemons v. Mississippi, supra.*" *State v. Lott, supra*, 51 Ohio St.3d at 170, 555 N.E.2d at 304. *See State v. Landrum, supra*, 53 Ohio St.3d at 124, 559 N.E.2d at 729. R.C. 2929.05 mandates such an independent reweighing in both the court of appeals and this court. Accordingly, Combs' proposition of law No. 3 lacks merit.

B

Mitigating Factors Not Raised

In proposition of law No. 4, Combs argues prejudicial error because the trial court instructed the jury on all statutory mitigating factors, including those not raised by defense counsel. Combs also contends that the prosecutor's argument converted those statutory factors into nonstatutory aggravating circumstances.

In *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, we condemned references to statutory mitigating factors not raised by the evidence; however, this error does not require reversal. Combs objected neither to the instruction nor to the prosecutor's argument. In fact, defense counsel proposed an instruction listing all statutory factors; hence, Combs induced any instructional deficiency that did occur. A party cannot complain about induced error. *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 31 OBR 587, 511 N.E.2d 106.

Here, no miscarriage of justice, plain error, or material prejudice resulted from references to

nonapplicable mitigating factors. The trial court stated twice that some mitigating factors may not be relevant and followed the neutral, statutory words in listing the factors. The prosecutor did argue that none of the statutory mitigating factors applied and did give reasons. However, the prosecutor fairly argued the case and did not try to create nonstatutory aggravating circumstances. See *State v. Roe* (1989), 41 Ohio St.3d 18, 26, 535 N.E.2d 1351, 1361; *State v. DePew, supra*, 38 Ohio St.3d at 289-290, 528 N.E.2d at 557-558.

C

Setting Date of Death Sentence

In proposition of law No. 5, Combs argues that R.C. 2929.71, requiring mandatory sentences for firearm specifications, precludes setting an execution date for his death sentences before six years of actual incarceration. Combs argues he has a "right to serve the six years" for the gun specifications before execution.

However, Combs' argument lacks merit. R.C. 2929.71 does not refer to death sentences and does not require that sentences for firearm specifications be served before execution of a death sentence. The operative words of R.C. 2929.71 specify that "* * * each of the three-year terms of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to, the life sentences or indefinite terms of imprisonment imposed pursuant to * * *." (Emphasis added.) Thus, R.C. 2929.71 refers only to life or indefinite term sentences and does not affect execution dates. Moreover, Combs waived this issue by not objecting at trial. *State v. Williams* (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364.

D
Trial Court's Sentence

In proposition of law No. 6, Combs argues the trial court failed to adequately weigh his intoxication at the time of the offenses as a significant "other factor" pursuant to R.C. 2929.04(B)(7). Combs also argues that the trial court used the nature and circumstances as an aggravating circumstance in its sentencing determination.

The trial judge did not err in considering the asserted mitigating factor of intoxication. Instead, the trial judge simply determined that "defendant was responsive and not under the influence of drugs or alcohol at the time." The assessment of and weight to be given to mitigating evidence are matters for the trial court's determination. "* * * The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight." *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus.

The trial judge's reference to the nature and circumstances of the offense was permissible. That reference explained why the evidence "permitted the jury to find that the aggravating circumstance outweighed the mitigating factors." A trial court or three-judge panel "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors." *State v. Stumpf, supra*, 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus. Moreover, the trial court's opinion referred to only one aggravating circumstance, the charged course of conduct. Additionally, our independent sentence reassessment will cure any deficiency in the trial court's sentencing decision. *State v. Landrum, supra*, 53 Ohio St.3d 107, 559 N.E.2d

710; *State v. Lott, supra*, 51 Ohio St.3d 160, 555 N.E.2d 293. Thus, Combs' claim of error lacks merit.

E
Antisympathy Instruction

In proposition of law No. 7, Combs argues plain error because the trial court instructed the jury: "Remember, you must not be influenced in your deliberations by any consideration of sympathy or prejudice." Since Combs did not object at trial nor raise this issue before the court of appeals, waiver applies. That instruction fails to qualify as plain error because the outcome of the trial was not affected. *State v. Long, supra*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804; *State v. Williams, supra*, 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364.

Moreover, considered as a whole, the instructions adequately informed the jury of its responsibility to consider all the defense's mitigating evidence. See *California v. Brown* (1987), 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934, 942 (O'Connor, J., concurring). An instruction to exclude bias, sympathy or prejudice ensures that sentencing is based on reviewable guidelines, not a juror's personal bias or sympathy. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph three of the syllabus; *State v. Steffen, supra*, 31 Ohio St.3d at 125, 31 OBR at 285, 509 N.E.2d at 396. Requiring that capital sentencing be based on sympathy that jurors feel for an accused would be a new constitutional rule applying the Eighth Amendment. *Saffle v. Parks* (1990), 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415.

F

Proportionality Arguments

In propositions of law Nos. 13 and 14, Combs argues against the present structure of Ohio's proportionality review. Combs' arguments lack merit. Proportionality review is not constitutionally required. *Pulley v. Harris* (1984), 465 U.S. 37, 50, 104 S.Ct. 871, 879, 79 L.Ed.2d 29, 40; *State v. Jenkins, supra*, at 176, 15 OBR at 321, 473 N.E.2d at 278. The proportionality review mandated in R.C. 2929.05 "is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *State v. Steffen, supra*, paragraph one of the syllabus.

V

Ineffective Assistance of Counsel

Combs argues in proposition of law No. 11 that his counsel did not effectively assist him because his counsel failed to object to an instruction, to the prosecutor's sentencing argument, and to the admission of an involuntary confession into evidence.

Reversal of a conviction or sentence based on ineffective assistance requires meeting the two-prong standard of *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *Strickland* requires: (a) deficient performance, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (b) prejudice, "errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. As to performance, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693, 104 S.Ct. at 2067, 80 L.Ed.2d at 697. "To show that a defendant has been prejudiced by

counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. See, also, *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154; *State v. Hester* (1976), 45 Ohio St.2d 71, 74 O.O.2d 156, 341 N.E.2d 304.

Combs first argues ineffectiveness because his counsel failed to object to his statement to the police, "talk to * * * [my] lawyer," and the jury considered that statement on the issues of intention and prior calculation and design. However, the Constitution does not promise an error-free trial. "[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac* (1982), 456 U.S. 107, 134, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783, 804.

Even if counsel performed deficiently, Combs was not prejudiced by the evidence or the instruction. Combs' identity as the killer was not an issue, and the evidence of purposefulness and prior calculation and design was otherwise compelling. As discussed in Part I, no reasonable probability exists that the result of the trial would have been different because of counsel's failure to object. See *Strickland v. Washington, supra*, 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 696; *State v. Bradley, supra.*

Similar reasoning applies to defense counsel's failure to object to the prosecutor's sentencing argument. Combs argues that the prosecutor erred in speculating on what the two victims were thinking in the moments before their death and by referring to the victims'

families. However, the speculative nature of the prosecutor's remarks was apparent, and the references to families were brief. Any deficiency in counsel's performance did not alter the trial result given the aggravating circumstance and the lack of significant mitigating factors. *Strickland v. Washington, supra; State v. Bradley, supra.* Additionally, our independent reassessment of the evidence and the death sentence will rectify any error that occurred. *State v. Landrum, supra,* 53 Ohio St.3d at 124, 559 N.E.2d at 729; *State v. Lott, supra,* 51 Ohio St.3d at 170, 555 N.E.2d at 304.

Combs further argues that his counsel's failure to move to suppress his confession constituted ineffective assistance. However, defense counsel had no basis on which to suppress this statement. *Colorado v. Connelly, supra,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473. Moreover, the admission of the statement made no difference at trial since Combs' identity as the killer was not an issue. (See Part III B, *supra.*)

V

Constitutionality

In proposition of law No. 12, Combs challenges the constitutionality of Ohio's death penalty statute using a wide variety of arguments. However, Combs failed to challenge the statute on many of these issues at trial. By failing to do so, he waived any constitutional objection on those grounds. *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, syllabus; *State v. Greer* (1988), 39 Ohio St.3d 236, 244, 530 N.E.2d 382, 394. Moreover, we have consistently rejected all of Combs' arguments. See *State v. Beuke* (1988), 38 Ohio St.3d 29, 38, 526 N.E.2d 274, 285; *State v. Bedford* (1988), 39 Ohio St.3d 122, 132, 529 N.E.2d 913, 923; *State v. Sowell, supra,* 39 Ohio St.3d at 336, 530 N.E.2d at 1309.

In proposition of law No. 15, Combs urges an equal protection argument that both the United States Supreme Court and we have rejected. See *McCleskey v. Kemp* (1987), 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262; *State v. Zuern* (1987), 32 Ohio St.3d 56, 512 N.E.2d 585, syllabus.

VII
Sentencing

A
Hearing

At the sentencing hearing, Combs presented a variety of witnesses to describe his history, character and background. His mother, Geraldine Combs, testified that Combs had a very close relationship with his now deceased alcoholic father, but Combs did start taking drugs and drinking when he was a senior in high school. Combs had a loving relationship with his own son, Joey, whose mother was Peggy Schoonover. Combs told his mother many times how sorry he was for what happened.

According to Lonnie and Darlene Britt, Combs' two close friends, Combs and Peggy had a close, loving relationship. Peggy lived with Combs on the weekends, but they argued and Peggy was going to take Joey and leave town. Combs and Joey loved each other very much, and they spent a lot of time together. Combs never threatened or acted violently towards Peggy.

Joann Wood described Combs' six-month stay in a residential treatment center for alcoholic and chemically dependent persons. Combs was addicted to alcohol, Valium, Seconal and marijuana. While there, Combs had group therapy every day and completed the program in March 1985. Earlier, Combs had undergone rehabilitation efforts with a group called Teen Challenge.

Karen Stewart, a nurse, cared for Combs in the hospital for a total of eight to ten weeks after the murders. Combs had numerous medical problems relating to his arms, but he was very cooperative. Although he did not directly discuss the crimes, Combs felt very remorseful and upset about what he had done. Laurie Flowers, an occupational therapist, confirmed Combs' cooperation in the hospital and described efforts to try to make Combs' left hand functional.

In an unsworn statement, Combs asserted that in high school he was very active in athletics, but he started drinking and taking muscle relaxants and downers (barbiturates). After high school, he continued drinking, smoking marijuana, and taking downers. He met Valerie, another chemically dependent person, and they had a son named Darrell. Later, he met Peggy, and they had a son, Joey.

In July 1987, Combs spent a night at Peggy's house, and Peggy's mother, Joan, who lived across the street, confronted him as he left. Joan held a .22 caliber pistol to his face and told him not to see Peggy or her grandson again. Combs agreed. Joan then "let the hammer like back down on the gun and she said I'm glad I made myself clear to you, now get on out of here." Combs left, went home, and started drinking heavily and later took drugs. On or about July 8, Peggy stopped talking to or seeing him.

By July 15, Combs thought about committing suicide. Tony Liming gave him the keys to go into Richard Liming's house and told him he could take any gun he wanted. After Combs got the shotgun, he thought, "why don't you just see if you can talk to them one more time. * * *" Combs said he drove to downtown Cincinnati and followed them just to talk, but then he blacked out.

He does not recall anything until he saw a gun being fired at him and next remembered waking up in a hospital. Combs does not understand why he killed the person he loved most in his life. He feels very empty, regrets what he did, and would gladly give up his life for both of theirs.

Dr. Roger Fisher, a clinical psychologist, interviewed Combs and found his childhood unremarkable until high school when Combs began abusing drugs. Because of drug abuse, Combs was in and out of jail a number of times. His relationship with Peggy was "very, very stormy," but he depended on her. They did not get along "largely because of Mr. Combs[']s immaturity, his impulsivity, his tendency to solve problems in sort of explosive temper tantrum like ways." Combs invested a lot of emotional energy in his relationship with Peggy. However, Joan strongly disapproved of Combs and did all she could to force Peggy to stop seeing him. "Combs became locked in * * * a contest of wills between himself and his girlfriend's mother who would influence Peggy." If Combs continued to see Peggy, her mother "would * * * take some steps, violent steps with a gun." Her mother "struck at him with a baseball bat trying to chase him away from her daughter."

Dr. Fisher believed that Combs, despite his history, would still be able to control and plan his behavior. He suffered from no mental disease or defect. "[H]e was capable of purposeful action, of forming insight, that is he would have known the consequences of his actions * * *." After the murders, Combs displayed significant remorse and wished he could go back and undo what happened.

Lisa Bonvillain, a psychiatric social worker, worked with Combs in individual and group therapy since his incarceration. She corroborated Combs' remorse. His concerns "deal primarily around loss, the loss of his girlfriend, of his sons, of his arm, of his freedom."

B
Analysis

The evidence supports the aggravating circumstance that the offense was "part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." R.C. 2929.04(A)(5). After independently considering the evidence and possible mitigating factors, the nature and circumstances of the offense offer some mitigating features. Combs loved his son and girlfriend and apparently acted out of an obsessive concern with those relationships. Nonetheless, the facts of the offense, including his car chase of Peggy and Joan and the brutal facts of their death, negate assigning any mitigating weight to this factor.

In contrast, Combs' history and background offer mitigation, although his character does not. Combs had significant alcohol and chemical dependency problems. He deeply loved his son, Joey. Although Combs lost his right arm and his left arm was paralyzed, that condition resulted from his own misconduct. Nonetheless, that loss itself represents a substantial burden on the remainder of Combs' life.

In considering statutory mitigating factors, the evidence shows that neither Peggy nor Joan "induced or facilitated" the offense within the meaning of R.C. 2929.04(B)(1). Both attempted to escape from Combs and did what they could to avoid a confrontation. The factor of "duress, coercion, or strong provocation," as set forth in

R.C. 2929.04(B)(2), is not applicable. Nonetheless, Joan's apparent decision, several days earlier, to threaten Combs with a gun and demand that he never see Peggy or Joey again, while not justifying or excusing his subsequent acts, could be considered mitigating. Peggy's decision to stop Combs from visiting their son also might be regarded as a provocation. Even though these acts do not fit R.C. 2929.04(B)(2), we will consider them as "other factors" under R.C. 2929.04(B)(7).

The psychologist's testimony failed to present any evidence of a mental disease or defect qualifying under R.C. 2929.04(B)(3), Combs' age of twenty-nine negates R.C. 2929.04(B)(4), and Combs does not claim to lack a significant criminal history under R.C. 2929.04(B)(5). No other actors were involved; hence, R.C. 2929.04(B)(6) is inapplicable.

Mitigating factors under R.C. 2929.04(B)(7) include Combs' alcohol and drug dependency, his psychological weakness, his physical disability, his remorse, the influence of drugs and alcohol at the time of the offense, Peggy's denial of visitation, and Joan's earlier threats.

Nonetheless, the aggravating circumstance as to each offense outweighs the mitigating factors. The aggravating circumstance, established by competent evidence beyond a reasonable doubt, is substantial: the deliberate murder of two persons with prior calculation and design. Combs not only killed Peggy and Joan, as he intended, he did so after expending great effort to obtain a shotgun and then chasing them through the streets. Aside from his remorse, which appears genuine, the mitigating factors that he does present are meager and entitled to little weight. Combs was offered several opportunities to control his chemical and alcohol dependency, but none proved successful. Although he may

have been under the influence of alcohol or drugs at the time of the murders, he functioned enough to drive and to chase Peggy and Joan in their car. Any provocation by Joan and Peggy was over a week old.

In this case, we conclude that the death penalty is both appropriate and proportionate when compared with similar capital cases. *State v. Moreland* (1990), 50 Ohio St.3d 58, 552 N.E.2d 894; *State v. Hicks* (1989), 43 Ohio St.3d 72, 538 N.E.2d 1030; *State v. Sowell, supra*, 39 Ohio St.3d 322, 530 N.E.2d 1294; *State v. Bedford, supra*, 39 Ohio St.3d 122, 529 N.E.2d 913; *State v. Brown* (1988), 38 Ohio St.3d 305, 528 N.E.2d 523; *State v. DePew, supra*, 38 Ohio St.3d 275, 528 N.E.2d 542; *State v. Spisak* (1988), 36 Ohio St.3d 80, 521 N.E.2d 800; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568; *State v. Brooks* (1986), 25 Ohio St.3d 144, 25 OBR 190, 495 N.E.2d 407.

Accordingly, appellant's convictions and sentences are affirmed.

Judgment affirmed.

SWEENEY, DOUGLAS and RESNICK, JJ., concur.

HOLMES, J., concurs in judgment only.

WRIGHT and H. BROWN, JJ., dissent.

WRIGHT, J. dissenting. I must respectfully dissent from this court's affirmance of the imposition of the death penalty. The prosecutorial misconduct graphically outlined by the majority simply cannot be passed off as harmless error beyond a reasonable doubt. Unlike several cases in which we have invoked the doctrine of

harmless error or rejected plain-error analysis, substantial mitigating factors were extant in this case.[2]

This court has been most reluctant to reverse imposition of the death penalty due in large measure to the effect of *State v. Penix* (1987), 32 Ohio St.3d 369, 513 N.E.2d 744. The General Assembly could easily deal with the effect of *Penix* by authorizing a second trial limited to the issue of whether the aggravating circumstance or circumstances outweigh the mitigating factors beyond a reasonable doubt. The cure for this legislative omission does not lie in repeatedly excoriating prosecutorial misconduct while allowing a tainted death penalty to stand. The right to a fair trial (including, most especially,

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[2] During the sentencing phase, Combs presented a significant amount of testimony and evidence in mitigation. The record reflects a loving relationship between Combs and his son, and a demonstration by Combs of genuine remorse for his actions. The record also reflects that Combs lived a life long-afflicted with the pains of alcohol and chemical dependence, and that he acted at the time of the shooting out of an obsessive concern that he would be prevented from ever seeing his son again.

Additionally, the jury heard Combs state that several days prior to and on the day of the incident, Combs had contemplated suicide. The jury also heard that as a result of the incident, Combs lost his right arm and his left arm became paralyzed-losses that constitute a significant burden for the remainder of his life. It is the sum of these mitigating factors that the jury considered in an environment tainted by prosecutorial misconduct. Whether their weighing of the mitigating factors in an atmosphere free from prosecutorial abuse would have brought about a different result, we will never know.

the sentencing phase of a capital case) is of paramount consideration in our criminal justice system.

"'[I]t is most important that the sentencing phase of the [capital] trial not be influenced by passion, prejudice, or any other arbitrary factor. * * * With a man's life at stake, a prosecutor should not play on the passions of the jury.' " *State v. DePew* (1988), 38 Ohio St.3d 275, at 299, 528 N.E.2d 542, at 566 (Wright, J., concurring in part and dissenting in part), quoting *Hance v. Zant* (C.A. 11, 1983), 696 F.2d 940, 951, certiorari denied (1983), 463 U.S. 1210, 103 S.Ct. 3544, 77 L.Ed.2d 1393. I had hoped that my repetition of this lesson would eventually move this court to accept it, see *State v. Bedford* (1988), 39 Ohio St.3d 122, at 134-135, 529 N.E.2d 913, at 925-926 (Wright, J., dissenting), but I see that it has not. Accordingly, I must dissent.

H. BROWN, J., concurs in the foregoing dissenting opinion.

APPENDIX G

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Case No. C-880156

STATE OF OHIO, Plaintiff-Appellee,

vs.

RONALD DEAN COMBS, Defendant-Appellant.

Criminal Appeal from: Hamilton County Court of Common Pleas.

Judgment Appealed from is: Affirmed

Independent Review: Aggravating Circumstance Outweighs Mitigating Factors

Appropriateness: Sentence of Death is Appropriate

Date of Judgment Entry on Appeal: September 19, 1990

Arthur M. Ney, Jr., Prosecuting Attorney, Thomas P. Longano, Esq., and Mark E. Piepmeier, Esq., 411 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

H. Fred Hoefle, Esq., 1500 American Building, 30 East Central Parkway, Cincinnati, Ohio 45202, and Chuck R. Stidham, Esq., 703 Jefferson Avenue, Cincinnati, Ohio 45215, for Defendant-Appellant.

DECISION.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, the briefs and the oral arguments of counsel.

Ronald Dean Combs ("appellant") was found guilty of two counts of aggravated murder and the two specifications that accompanied each count: the first specification was that each murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons; and the second specification was that the appellant had a firearm on or about his person while committing each murder. The jury verdict finding the appellant guilty was followed by a penalty hearing at which the jury, after determining beyond a reasonable doubt that the aggravating circumstance involved in both homicides outweighed the mitigating factors, recommended the imposition of the death penalty. The trial court by separate written opinion followed the recommendation of the jury.

The appellant and Marguerite Peggy Schoonover ("Peggy") were the unmarried parents of a son. Joan Schoonover ("Joan"), the mother of Peggy, opposed the efforts of the appellant to see his son, who was three at the time of the homicides.

On July 15, 1987, the appellant obtained a double-barreled shotgun from a relative's residence and drove to the vicinity of the establishment where Peggy and Joan were employed. When Peggy and Joan left work in an automobile driven by Joan, the appellant pursued them until they stopped in a parking lot at 644 Linn Street in

Cincinnati. In the resulting confrontation, the appellant fired his shotgun at Peggy and Joan, inflicting wounds which caused the immediate death of both women. An off-duty Hamilton County deputy sheriff then shot the appellant, who was ultimately arrested after receiving treatment for his wounds at a local hospital.

The appellant did not deny that he had caused the deaths of Peggy and Joan. The primary theory of his defense was that he was so intoxicated with drugs and alcohol that he was unable to form the requisite intent to commit aggravated murder.

The appellant now advances sixteen assignments of error, six of which are related to the guilt or innocence portion of the trial and ten of which are related to the penalty and sentence portion of the trial. Some of the sixteen assignments present questions that have been considered before. In the absence of any new argument, we will dispose of those assignments summarily.

The first and second assignments of error have been briefed and argued together and we shall address them in like manner. In the first assignment, the appellant asserts that the trial court committed plain error by its instruction that the jury was permitted to consider the appellant's statement (that the police should talk to his attorney) as evidence of the existence of purpose and prior calculation and design. The second assignment claims ineffective assistance of counsel because counsel failed to object to the jury instruction. We find neither assignment to be well made.

The deputy sheriff who shot the appellant had left the scene to reload his service revolver before any Cincinnati police officer arrived. The first Cincinnati officer on the scene was Douglas Ventre, and when he arrived there was no indication of what had happened

other than that some people had been shot. Ventre testified that, while in the parking lot, he never saw nor spoke to the deputy sheriff. He was, however, able to speak briefly with the appellant to inquire what had happened but learned only that "some guy shot [him]." Clearly, at that point, the appellant was not under arrest nor even the focus of Ventre's investigation. The paramedic team arrived and prepared the appellant to be moved to the hospital. When the appellant was on the gurney, Officer Ventre testified that he again asked the appellant what had happened and that the appellant answered by instructing the officer to "talk to [appellant's] lawyer." There was no further communication between the officer and the appellant before the appellant was taken to the hospital. Following cross-examination, Officer Ventre was excused and the trial judge immediately addressed the jury as follows:

> Members of the jury, I am going to give you a special instruction at this time based upon the testimony that you heard the defendant Ronald Dean Combs has a constitutional right not to speak to members of law enforcement without counsel and not to speak to them. You cannot draw any inferences for or against the defendant because he may have requested an attorney or made no further statements to Officer Ventre when he was on the stretcher as Officer Ventre testified to.
>
> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give to this testimony depends upon your findings and the weight that you attribute to this testimony in this regard so please remember that.

Although there may be some inconsistency on the face of the instruction about whether the appellant's statement could be used in any way, we consider this limiting and cautionary instruction to be appropriate and without error under the circumstances as reflected by the record of this case, in that it ultimately conveyed the narrow purpose for which the jury could consider the testimony. The same considerations compel the conclusion that the appellant's reliance on *State v. Rogers* (1987), 32 Ohio St.3d 70, 512 N.E.2d 581, is misplaced. The significant factual difference between Rogers and the instant case is that the defendant in Rogers had been arrested and advised of his rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 85 S.Ct. 1602, prior to making the statements forming the basis of the alleged instructional error. In the case on review, the appellant had not been arrested, had not been advised of his rights as announced in Miranda, and was not being interrogated in an investigation which had focused on him. Here, because there was no inducement to silence and no subsequent breach of a promise not to use that silence against the appellant, we do not have the sort of conduct that was disapproved in *Rogers, supra*, and in *Wainwright v. Greenfield* (1986), 474 U.S. 284, 106 S.Ct. 634. The first assignment of error is overruled.

The second assignment of error is that the appellant was denied the effective assistance of counsel because his attorney did not object to the instruction challenged in the first assignment of error. Because we have concluded that the subject instruction was without error, it must follow that a failure to object to an unobjectionable instruction did not constitute ineffective assistance of counsel. The second assignment of error is overruled.

The next assignments of error concerning the guilt or innocence phase of the trial are the ninth, tenth and eleventh assignments, which are propounded by the appellant as follows:

Ninth Assignment of Error

> The trial court committed prejudicial error in excluding from evidence the hospital record concerning the blood tests administered by the treating hospital, which revealed the ingestion of alcohol and drugs and which tended to support appellant's intoxication defense, in violation of appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and the concomitant provisions of the Ohio Constitution.

Tenth Assignment of Error

> The trial court committed plain error in permitting state witness Leigh Ann Wright to testify to certain statements purportedly made by appellant, denying appellant the right to due process of law under the Fourteenth Amendment to the Constitution of the United States, and Art. I, Sec. 16 of the Ohio Constitution.

Eleventh Assignment of Error

> Appellant was denied the effective assistance of counsel due to the failure of trial counsel to file a motion to suppress his statement to Nurse Wright as an involuntary statement.

We address the ninth and tenth assignments together because they both involve the legal principles that govern rulings on the admission or exclusion of evidence.

The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. An appellate court will not disturb the exercise of that discretion absent a showing that the trial court abused its discretion as that term has been defined in Ohio. *See Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91, 437 N.E.2d 1199, 1201; *Krupp v. Poor* (1970), 24 Ohio St.2d 123, 265 N.E.2d 768, paragraph two of the syllabus.

The trial court admitted the hospital record of the first few days of the appellant's hospitalization after he was shot by the deputy sheriff. The rest of the tendered hospital record, covering a period of several weeks, was properly excluded as being irrelevant to the issues raised in this case, including the defense of intoxication. The trial judge also excluded a laboratory report of an alcohol screen test. This report reflected, without interpretation, raw data that would, by itself, have been unintelligible to the ordinary lay person. In addition, the trial court took note of the absence of any record indication of who administered the test, when the test was made, and how the test was performed. The test was properly excluded under Evid.R. 403(A).

Voluntary intoxication is not a defense except as it may indicate an inability to engage in prior calculation and design or to attain the culpable mental state of purposefulness. Nothing in the record indicates that condition. To the contrary, Dr. Roger Fisher, an expert witness offered by the defense on the issue of the effect of the alcohol and drugs used by the appellant prior to the homicides, specifically refused to state that the appellant did not act purposefully even if he had been in a state of intoxication. In view of the foregoing, the trial jurist did not abuse his discretion in excluding irrelevant hospital records and the alcohol screen test result.

The appellant, not having objected to the testimony of Leigh Ann Wright relevant to statements made by the appellant, seeks to charge the court with plain error in permitting that testimony. The appellant argues that his statements to Leigh Ann Wright were involuntary because of the drugs and alcohol he claims to have used before the homicides and because of the drugs administered to him as part of the treatment at the hospital. We disagree. The record contains notations of medication administered to the appellant prior to the time when the appellant initiated the discussion with nurse Wright concerning Joan and Peggy, but there is no evidence as to the effect of that medication. There is likewise no evidence that the statements of the appellant were made because he was in fear, or threatened with harm, or because of any promise, inducement, or hope of reward. Also, there is no evidence that his condition at the time he made the statements was such that, as a matter of fact, the statements were involuntary. Clearly, the record does not support a conclusion they were involuntary as a matter of law.

Plain errors affecting substantial rights may be noticed even though they were not brought to the attention of the trial court. Crim.R. 52(B). We have previously defined a plain error as "an obvious error which is prejudicial to an accused, although neither objected to nor affirmatively waived, which, if allowed to stand, would have a substantial adverse impact on the integrity of and public confidence in judicial proceedings." *State v. Craft* (1977), 52 Ohio App.2d 1, 7, 367 N.E.2d 1221, 1225. The admission of the testimony of nurse Wright does not constitute plain error.

It follows that defense counsel did not deny the appellant the effective assistance of counsel by his failure to object to nurse Wright's testimony concerning the statements of the appellant. There was no basis in law or in fact for the exclusion of her testimony, and the failure to

object or to move to strike it was not, under the circumstances of this case, indicative of ineffective assistance of counsel. *See State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623. The ninth, tenth, and eleventh assignments of error are without merit and are therefore overruled.

The last assignment of error related to the guilt or innocence portion of the trial is the fifteenth, which asserts that the trial jury was improperly constituted by the exclusion of certain prospective jurors because of their views on capital punishment. We disagree.

Of forty-four venire members examined on voir dire, only seven were excused because of their views on capital punishment. Those seven were carefully examined respecting their views on that aspect of the law, and each stated, in substance, that his view of capital punishment was such that he would be unable to follow the law if it entailed taking action to recommend the death penalty. Each of the seven indicated that his position was firmly fixed and would prevent or substantially impair the performance of his duties as a juror. *See Wainwright v. Witt* (1985), 469 U.S. 412, 105 S.Ct. 844; *State v. Rogers* (1985), 17 Ohio St.3d 174, 478 N.E.2d 984. Other venire members who expressed some reservation about capital punishment but who were not intransigent in their opposition were not excused. We find this assignment of error to be without merit.

Having determined that none of the assignments of error directed to the guilt or innocence portion of the trial has merit, we next consider those assignments arising from the penalty portion of the trial.

The appellant contends in his third assignment that the trial court erred by setting the date for execution of the death penalty before the expiration of the consecutive

three-year sentences imposed on the two firearm specifications. This assignment of error is not well made.

First, the matter was not raised at the time of sentencing when, if it did constitute error, the court would have had an opportunity to correct it. Therefore, the assignment is without merit on the authority of *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364.

Second, the appellant cites only R.C. 2929.71 as authority for this assignment of error. As the appellant notes, that statute applies only to life sentences imposed for rape, felonious sexual penetration or murder and not to death sentences.

Finally, even if error is assumed, it is difficult to perceive prejudice to the appellant with the pragmatic awareness of the time involved in state and federal appeals of death sentences.

The third assignment of error is overruled.

The appellant has argued the fourth and fifth assignments together and we shall address them similarly. Both assert plain error in the following manner:

Fourth Assignment of Error

> The trial court committed plain error in instructing the jury at the penalty phase of the proceedings as to each and every statutory mitigating factor, whether or not it applied to the facts and circumstances of the case.

Fifth Assignment of Error

> The trial court committed plain error to the prejudice of appellant by permitting the prosecution to convert the absence of certain statutory mitigating factors into nonstatutory aggravating factors during penalty phase argument, which prejudiced appellant's right to reliability in the determination of whether he should be executed.

Neither of these assignments of error has merit.

R.C. 2929.04(B) requires the trier of fact to consider and weigh against those aggravating circumstances, as listed in R.C. 2929.04(A), that are proven beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender, and all of seven listed factors. Although the statute seems to mandate consideration of all seven of the mitigating factors, the Ohio Supreme Court has held that the defendant has the right to present and argue the mitigating factors, and that if he does not address certain factors, no comment on those not raised by the defendant is permissible. *State v. DePew* (1988) 38 Ohio St.3d 275, 528 N.E.2d 542.

The instruction in the case on review predates *DePew*. The trial judge in the instant case gave an instruction that noted the aggravating circumstance of which the defendant had been found guilty beyond a reasonable doubt and that the jury was to weigh that aggravating circumstance of each homicide against the mitigating factors. The instruction further noted that some of the mitigating factors provided by statute might not apply in the case under consideration. Beyond listing, almost verbatim, the mitigating factors as contained in R.C. 2929.04(B), the trial judge gave no further indication that would lead the jury to believe that the appellant was

obligated to produce evidence on each mitigating factor. The jury was informed that some of the mitigating factors might not be present in the facts and circumstances of the case against the appellant. As noted in *DePew, supra* at 289, 528 N.E.2d at 558:

> In this case, the trial court read all the statutory mitigating factors to the jury but made no comment on the factors that were not presented by appellant. This was certainly not prejudicial error, though the better practice is certainly to refrain from even referring to mitigating factors not raised by the defendant.

The court in the instant case followed the same procedure. On the authority of *DePew, supra*, we hold that the court below did not commit plain error as asserted in the fourth assignment of error.

The fifth assignment of error, as noted, is closely related to the fourth. The Supreme Court has held that if a defendant chooses not to raise some or all of the mitigating factors available to him, such omitted mitigating factors may not be commented upon or be referred to by either the trial court or the prosecution. *State v. DePew, supra.* In the case on review, the appellant protests that the comments by the prosecution on mitigating factors that the appellant had chosen not to advance had the effect of converting such absent mitigating factors into nonstatutory aggravating circumstances. We have reviewed the argument of the prosecution in the penalty phase of the trial and do not agree with the appellant's characterization of it. The remarks to which the appellant now objects occurred during the first part of the final argument by the prosecution. In context, the remarks were little more than an explanation of the possible or potential mitigating factors, as they were termed by the prosecutor, to be placed on the scale and weighed against

the aggravating circumstance. Although we agree with the Supreme Court in *DePew, supra*, that the better practice would be for no comment to be made on the mitigating factors unless advanced by the defense, such comments do not in this case, which was argued before *State v. DePew, supra*, was decided, rise to level of plain error. The fifth assignment of error is overruled.

The sixth and seventh assignments of error assert, respectively, plain error in permitting improper argument by the prosecution, and ineffective assistance of counsel in failing to object to the improper argument.

In the allegedly improper argument, the prosecutor reflected on what the thoughts of Peggy and Joan must have been during the final moments before they were shot. The remarks were made in the context of a discussion of the aggravating circumstance that had been found by the jury beyond a reasonable doubt: a purposeful killing of two or more people. A discussion of that aggravating circumstance and all that it entailed was proper to assist the jury in its determination of whether the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt.

There was no objection interposed to this argument, and the appellant has phrased this assignment of error so as to claim plain error. Notice of plain error "is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804. We do not believe the arguments of the prosecutor rise to this standard, nor do they amount to an appeal to the passion and emotion of the jury. The sixth assignment of error is overruled, and it follows, accordingly, that the corresponding claim of ineffective assistance of counsel, as set forth in the seventh assignment, must also fail.

In the eighth assignment of error, the appellant asserts that the trial court erred in its treatment of the mitigating factor of intoxication and in considering the nature and circumstances of the offenses as aggravating. In his separate opinion pursuant to R.C. 2929.03(F), the trial judge fully complied with the requirements of that section of the revised code. He considered each of the factors listed in R.C. 2929.04(B)(1) through (7) as well as the nature and circumstances of the offenses. In his opinion, the trial judge addressed the subject of drug and alcohol intoxication and its relevance and weight as a mitigating factor in two places. First, as it applied in consideration of R.C. 2929.04(B)(3), he concluded that notwithstanding the history of the appellant's drug and alcohol abuse, the appellant did not, because of mental disease or defect, lack substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of the law. In short, he was capable of acting purposefully. Second, the judge considered the subject of intoxication in R.C. 2929.04(B)(7) as another factor relevant to the issue of whether the appellant should be sentenced to death and concluded that the presence of this factor was brought into serious question by the testimony of the paramedic that the appellant was responsive and not under the influence of drugs or alcohol at the scene. The trial judge did not fail to consider the appellant's intoxication. He did not narrow mitigating factors out of existence.

The treatment of the nature and circumstances of the offense was proper. The statute (R.C. 2929.04[B]) requires that the "nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors be weighed against the aggravating circumstances proved beyond a reasonable doubt." The jury was instructed that the nature and circumstances of the aggravated murders were relevant only insofar as they might relate to any mitigating factor.

The separate opinion of the trial judge reflects the same correct consideration of the nature and circumstances of the offense. The eighth assignment of error is overruled.

The twelfth assignment of error, that the sentence imposed upon the appellant is disproportionately severe when compared to sentences imposed in similar cases, is overruled.

There is no constitutionally mandated proportionality review. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264, citing *Pulley v. Harris* (1984), 465 U.S. 37, 104 S.Ct. 871. The appellant relies heavily on *Solem v. Helm* (1983), 463 U.S. 277, 103 S.Ct. 3001, in asserting that the Eighth and Fourteenth Amendments to the United States Constitution require a comparative proportionality review independent of the review mandated by R.C. 2929.05. That case involved a life sentence without possibility of parole for the South Dakota offense of issuing a check for $100 on a nonexistent account. The 5-4 court held that sentence to be significantly disproportionate to the crime and in violation of the United States Constitution. However, *Pulley v. Harris*, *supra*, decided after the Solem case, involved a death sentence imposed under a California statute which made no provision for a proportionality review of a death sentence.

The Ohio capital-punishment scheme does provide for review by the intermediate appellate courts and the Supreme Court, including a consideration of whether the sentence imposed is excessive or disproportionate to the penalty imposed in similar cases. R.C. 2929.05(A). Pursuant to that statute and in accord with *State v. Steffen* (1987), 31 Ohio St.3d 111, 509 N.E.2d 383, paragraph one of the syllabus, we have considered the cases already decided in this district in which the death penalty has been imposed, and we are not of the opinion that the penalty

imposed in the instant case is excessive or disproportionate to the penalty imposed in similar cases. The twelfth assignment of error is overruled.

This court has previously considered the theory and arguments advanced in the thirteenth and fourteenth assignments of error and found them to be without merit. In the absence of any new authority, we are not persuaded to change our position. Assignments of error thirteen and fourteen are overruled.

The appellant was granted leave, shortly before the oral argument of this case, to supplement his brief with a sixteenth assignment of error protesting the instruction to the jury in the penalty phase that the jurors should not be influenced in their deliberations by any consideration of sympathy or prejudice. This approved jury instruction was not the subject of objection at trial and is therefore waived. *State v. Lane* (1976), 49 Ohio St.2d 77, 358 N.E.2d 1081, paragraph one of the syllabus. The sixteenth assignment of error is overruled.

Having ruled upon the sixteen assigned errors and having found none to be well taken, we now review and weigh, independently, all the evidence contained in the record, consider the offense and the offender, and determine whether the aggravating circumstance of each homicide outweighs the mitigating factors. R.C. 2929.05(A).

The evidence is uncontroverted that the appellant had consumed whiskey and various drugs prior to the shootings, but not enough, according to the expert testimony, to render him incapable of appreciating the difference between right and wrong or of conforming his conduct to the right. Also, he drove some distance to steal a shotgun from a relative's home, professedly in order to commit suicide, then drove to downtown Cincinnati, sought

out Peggy and Joan and pursued them to the parking lot on Linn Street where there was no further opportunity for them to escape. The appellant then alighted from his vehicle, with the shotgun in hand and additional shells taped to his body, approached the victims' vehicle, broke a window at the front seat and shot each occupant in the head. The record contains sufficient competent, credible and probative evidence to establish that the appellant is guilty, beyond a reasonable doubt of the two aggravated murders and the specified aggravating circumstance to each: that is, that each homicide was part of a course of conduct involving the purposeful killing of two or more persons by the appellant.

In mitigation of the imposition of the death sentence, the appellant called as witnesses his mother, a corrections officer at the justice center infirmary, a friend of sixteen years and her husband, a group therapist who worked with alcoholics and chemically dependent persons, a registered nurse, an occupational therapist, a clinical psychologist, and a psychiatric social worker at the justice center. In addition to their testimony, the appellant himself made an unsworn statement. It is impossible to evaluate and weigh the mitigation testimony and the unsworn statement except as they are relevant to the issue of whether the appellant should be sentenced to death. R.C. 2929.04(B)(7).

> The substance of the factors offered by the appellant in mitigation is that he was a member of a family that was very close-knit; that, despite some parental abuse, he loved his father but was unable to visit the hospital when his father was dying with cancer, turning instead to the abuse of alcohol and drugs; that the appellant had made efforts to overcome his dependency on alcohol and drugs; and that he had

> expressed remorse for the killing of Peggy and Joan. Beyond a reasonable doubt, the aggravating circumstance of each murder outweighs the mitigating factors. We conclude that the sentence that was recommended and imposed was fully justified.

Finally, we have compared the sentence of death imposed in the case on review with other such cases we have considered and decided in the past. We conclude that the sentence of death imposed upon the appellant herein is neither excessive nor disproportionate to the sentence imposed in similar cases, and that it is the appropriate sentence.

We affirm the judgment of the trial court from which this appeal is taken.

DOAN, P.J., KLUSMEIER and HILDEBRANDT, JJ.

Supreme Court, U.S.
FILED
OCT 30 2000
CLERK

(3)

No. 00-312

IN THE

Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,

Petitioner,

v.

RONALD DEAN COMBS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

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I. STATEMENT OF THE CASE

A. Introduction

On July 31, 1987, Respondent, Ronald Dean Combs was indicted by the Hamilton County, Ohio Grand Jury on two counts of aggravated murder, each carrying a death penalty specification. On February 22, 1988, after a trial infested with grave, and pervasive constitutional errors, the jury returned a verdict imposing a sentence of death. After a decade of efforts to remedy these grievous errors, on February 23, 2000, the United States Court of Appeals for the Sixth Circuit put an end to this constitutional charade, and granted Respondent's writ of habeas corpus. Now, in a final and desperate attempt to salvage patently defective decisions rendered below, Petitioner has simply ignored the factual record of these proceedings, and mischaracterized the applicable law. When the actual record is reviewed in light of the relevant case law, it is clear that the Petition for a Writ of Certiorari (the "Petition") should be denied.

B. Constitutional Errors Committed During The Trial

1. Ineffective Assistance Of Counsel

Mr. Combs' sole defense at trial was that he was so intoxicated that he was incapable of forming the intent and purpose necessary for a capital conviction. While the presentation of a cogent intoxication defense was therefore essential, Mr. Combs' trial counsel—who had never previously handled a death penalty case and was subsequently suspended from the practice of law—failed miserably in this effort throughout the trial proceedings. *Cincinnati Bar Ass'n v. Stidham*, 721 N.E.2d 977 (Ohio 2000).

a. Failure To Object To Or Remedy The Impermissible Use Of Mr. Combs' Statement "Talk To My Lawyer"

One of the starkest examples of trial counsel's ineffectiveness was in the failure to object to not only the prosecutor's elicitation and use of Mr. Combs' statement "talk to my lawyer" to prove

Combs acted with purpose and prior calculation and design, but also the trial court's subsequent instruction to the jury that they could consider the statement for just that purpose. During its case-in-chief, the prosecutor called Cincinnati police officer Douglas Ventre to the stand. Officer Ventre testified:

> After the rescue unit had gotten there and gotten him [Mr. Combs] on the stretcher and wheeled him back to about here behind the vehicle, I asked him again, he was laying on the stretcher and I was over top of him I asked him again to tell me what happened and he told me talk to his lawyer.

(Transcript ("TR") 1045.)[1] There was no defense objection. Immediately after Officer Ventre had concluded his testimony, the trial court, *sua sponte*, instructed the jury as follows:

> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design, but what weight you give to this testimony depends upon your findings and the weight that you attribute to his testimony in this regard so please remember that.

(TR 1052 (emphasis added).) Again, there no was defense objection.

And, while defense counsel (albeit feebly) attempted to show that Mr. Combs was too intoxicated to form the requisite intent to commit capital murder during closing arguments, the prosecutor relied heavily on the "talk to my lawyer" statement to refute Mr. Combs' intoxication defense. Incredibly, defense counsel again stood by silently as the prosecutor emphasized in his closing argument:

> Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated that he doesn't know what is going on? Isn't that evidence that he realizes the gravity of the

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[1] Selected portions of the trial transcript were lodged with the Court by Petitioner and additional relevant portions have been lodged by Respondent.

> situation and at [the] time gave that particular comment or response to Officer Ventre.

(TR 1255.)

b. Failure To Investigate, Object To, Or Avoid Repetition Of Dr. Fisher's Testimony

Trial counsel's ineffective representation was also evident in the devastating opinion testimony that was provided by Mr. Combs' own expert witness, Dr. Roger Fisher, on the ultimate issue during the culpability phase — Mr. Combs' intent. Trial counsel testified that he put Dr. Fisher on the stand for the express purpose of establishing that Mr. Combs "'Could not act purposely and intentionally because of his diminished capacity.'" *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (quoting Stidham deposition). However, trial counsel admitted that he had no idea before trial that Dr. Fisher's opinion was exactly the opposite, and was "surprised" by Dr. Fisher's testimony. *Id.* As a result of trial counsel's gross negligence, on four separate occasions testimony was elicited from Dr. Fisher that Mr. Combs acted "intentionally" and "purposefully" on the day of the offenses. (TR 1183, 1188, 1385, 1388.)

During closing argument in the culpability phase of the trial, the prosecutor relied heavily upon Dr. Fisher's concessions, emphasizing them on three separate occasions, including the following statement, to establish the elements of purposefulness and prior calculation and design:

> In fact the defendant's own expert Dr. Fisher who testified about he interviewed the defendant, really into a lot of what was said there but he did conduct this interview and he said yes, based on what he is told the defendant may have been under the influence, but also based on what he was told this man intentionally and purposefully killed those women. That's the testimony from his own witness . . . .

(TR 1226-27; *see also* TR 1233-34, 1250-51.)

Were this not bad enough, during the sentencing phase, trial counsel elicited the same improper testimony on direct examination. (TR 1385.) Again, the prosecutor seized on the opportunity to have Dr. Fisher express agreement that "[the defendant] was capable of purposeful action, of forming insight" and that he intended to do what he did. (TR 1388.)

c. Failure To Object To Erroneous Jury Instructions

Trial counsel also failed to object to, or preserve for appeal, the trial court's erroneous jury instructions at the close of the culpability phase:

> The defendant maintains that he did not act purposely and he did not act with prior calculation and design because he was intoxicated and under the influence of drugs. Intoxication exists when a person consumes a quantity of intoxicating beverage containing alcohol sufficient to adversely effect his mental process and actions and to deprive him of that clearness of intellect and control of himself that he would have otherwise possessed. . . . [U]pon the issue the burden of proof is upon the defendant to establish by a preponderance or greater weight of the evidence that at the time in question he was so influenced by alcohol and drugs that he was incapable of forming a purpose to commit the offense and was also incapable of killing [the victims] with prior calculation and design.

(TR 1269-71; *see also* TR 1277.) The instruction was constitutionally defective because it shifted to Mr. Combs the burden of disproving an element of the State's case. *See Engle v. Isaac*, 456 U.S. 107 (1982). Again, trial counsel did not object or preserve this error for appeal and, indeed, admitted that he was unaware of the necessity of raising objections upon the completion of the trial court's instructions.

d. Concession Of Mr. Combs' Guilt

Trial counsel's concession of Mr. Combs' guilt during the culpability phase also constituted ineffective representation. At the

inception of the culpability phase, Mr. Combs' counsel "surrendered the sword" by framing the issue before the jury as whether Mr. Combs should live or die, an issue irrelevant to the culpability phase. (TR 915.) This concession was not lost on the prosecutor, who fully exploited it in closing statement: "In fact even in opening statements I believe defense counsel alluded to the fact there is really no question that this was a purposeful or intentional killing." (TR 1227.) Even the trial court attempted to explain to counsel that he was conceding murder and purpose. (TR 1134-35.) Yet again, counsel stood idly by while Mr. Combs' constitutional rights were thrown aside.

e. Failure To Suppress Or Object To Inadmissible Statements Attributed To Mr. Combs

Trial counsel also failed to seek to suppress, object to or remedy certain evidence that was highly prejudicial to Mr. Combs' defense. For example, trial counsel failed to seek to suppress two statements attributed to Mr. Combs, or to even object to their introduction into evidence. First, a paramedic testified that, when he arrived at the crime scene, Mr. Combs was uncooperative and hostile and indicated that his name was "Doc Holiday." (TR 1059.) Second, an intensive care nurse testified that, shortly after surgery necessitated by five gunshot wounds, Mr. Combs referred to the victims as "bitches" and "whores" and stated that they deserved to die. (TR 1089-90.)

Both statements should have been excluded because Mr. Combs' physical condition and the presence of law enforcement personnel rendered the statements involuntary and inherently unreliable. The paramedic conceded that Mr. Combs' condition was "poor" and "shocky" due to loss of blood and low blood pressure, and that, in response to questions, Mr. Combs at times did not answer, or "would mutter sounds that were not distinguishable, couldn't figure out what he said." (TR 1059-60, 1067-68.) Similarly, the nurse acknowledged that Mr. Combs uttered the derogatory comments while recovering in the intensive care unit from various substances, the effects of surgery and anesthesia, and a dose of morphine administered just fifteen

minutes before he made the challenged statements. (TR 1088-89, 1093-95.) *See Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (suppressing confession obtained from defendant hospitalized for abdominal gunshot wounds). At an absolute minimum, trial counsel should have sought to exclude these statements under the Ohio Rules of Evidence because their probative value—in light of Mr. Combs' physical condition—was clearly outweighed by their prejudicial effect.

f. Failure To Object To "Other Acts" Evidence

Trial counsel also made no effort to redact highly prejudicial portions of the videotaped deposition testimony of Tony Liming, Mr. Combs' cousin, introduced by the prosecutor. Liming, who was with Mr. Combs hours before the incident, was asked what his feelings were toward Mr. Combs. Liming responded: "He is, I guess I like him, I mean I liked him. He like did stuff, stole stuff from my mom and I didn't like that." (TR 944 (emphasis added).) Despite Liming's reference to Mr. Combs "stealing," trial counsel never sought to redact this portion of Liming's testimony as "other acts" evidence under Rule 404 of the Ohio Rules of Evidence.

g. Failure To Present Available Physical Evidence Of Intoxication

Trial counsel also failed either to introduce or secure the admission of important available physical evidence. For example, in his opening statement, trial counsel promised the jury that they would see documentary evidence of Mr. Combs' degree of intoxication. (TR 910.) Yet, despite the availability of this evidence counsel failed to introduce it. For example, while trial counsel intended to introduce a hospital report reflecting results of a blood alcohol test, (TR 1208-15), the prosecutor objected to the evidence based on lack of authentication. (TR 1208-11.) In response, trial counsel meekly argued "we don't feel that we have to bring anyone in to establish that they are authentic." (TR 1209.)

Other than trial counsel's failed attempt to introduce the blood alcohol tests, trial counsel did not investigate and present available physical evidence of Mr. Combs' intoxication at the time of the

shootings. At trial, the prosecutor introduced testimony from an officer that had conducted a search of Mr. Combs' car. (TR 1080-81.) The officer testified that he did not find any type of container used to hold alcohol. (*Id.*) Trial counsel presented no evidence to refute this testimony, again despite its availability. During post-conviction proceedings, Mr. Combs' mother testified that "when she got the car back from the police after their investigation there were wine cooler bottles, and beer cans in the car and that a cooler in the back still contained two beers." *Combs*, 205 F.3d at 289. Trial counsel later admitted that he did not learn of this evidence because he had not conducted an investigation for such evidence.

h. Failure To Secure Independent Psychological And Substance Abuse Expert Testimony

Trial counsel also failed to secure independent psychological and substance abuse expert testimony to explain Mr. Combs' diminished capacity on the day of the offenses. The only expert testimony proffered by trial counsel in support of Mr. Combs' defense came from Dr. Fisher, who was a court appointed psychologist. Even the most cursory investigation of Dr. Fisher's opinions would have led trial counsel to conclude that independent psychological expert testimony was essential. Also, a substance abuse expert would have testified that Mr. Combs suffered from a disorder known as Psychoactive Substance Dependency, which rendered him unable to control his behavior. The jury was never informed of Mr. Combs' disorder and its relationship to his offense.

i. Failure To Present Testimonial Evidence In Support Of Intoxication Defense

Trial counsel also failed to present evidence available from Mr. Combs' probation officer, Ms. Lang, that supported his intoxication defense. Mr. Combs' trial counsel failed to investigate, obtain and present admissible evidence that prior to the murder, Mr. Combs had a well-documented battle with substance abuse, and in fact had been subjected to, and consistently failed, drug and alcohol screens. In fact, results from

drug or alcohol tests performed during the summer of 1987—just days before the crime—were noted in Ms. Lang's files. Trial counsel was unaware of this evidence and did not obtain it or present it at trial.

j. Failure To Inform Jury Of Extent Of Mr. Combs' Substance Abuse

Finally, trial counsel failed to inform the jury of the full extent of Mr. Combs' substance abuse both immediately prior to the offense and historically. For example, trial counsel failed to account for the 50 Valium obtained by Mr. Combs from his aunt in the days preceding the offense, because trial counsel never questioned his aunt. Moreover, the wide array and sheer volume of substances historically abused by Mr. Combs was never placed before the jury. Nor did trial counsel explain that Mr. Combs frequently drove his car while under the influence of drugs. Evidence that Mr. Combs was a seasoned "under the influence" driver would have squarely contradicted the prosecutor's claim that Mr. Combs' ability to drive on the day of the offense was evidence of purposeful action. (TR 1252-54.)

2. Prosecutorial Misconduct

Mr. Combs was also subjected to a myriad of instances of constitutionally prohibited prosecutorial misconduct during the trial. During voir dire, the prosecutor repeatedly made incorrect statements of law, mischaracterizing the balancing and weighting of aggravating and mitigating factors required of Mr. Combs' jury. These errors continued during the sentencing phase. For example, the prosecutor improperly utilized victim impact evidence that was devoid of record support and designed to appeal to the passions of the jury. Having invited the jury to "think of the desperation of those women," (TR 1230), the prosecutor repeatedly speculated and improperly tendered victim impact evidence:

- "But think of their [Peggy and Joan's] last hours, think of their last ten minutes . . . were they now terrified." (TR 1402.)

- "Can you imagine the terror of that? A gun right to your head, was she [Joan] thinking of her husband, who was going to take care of him? Was she thinking about her childhood? Was she thinking about her daughter take me but spare Peggy? That's the aggravating circumstance, what she went through. Or maybe she started to pray, we don't know. He won't tell us." (TR 1404 (emphasis added).)

- "What did she [Peggy] think when this now hot steel pressed against the back of her head and she knew she too wasn't going to be given any mercy. What went through her mind, what was she thinking? Was she thinking of little Joey, who's going to take care of him, grandma is gone, I'm going to be gone who's going to raise my little boy. And then came the pull of that second trigger, and she's gone. That's the aggravating circumstance. . . ." (TR 1405 (emphasis added).)

- "What weighs more, these totally good lives or the defendant's life in the fast lane?" (TR 1406.)

In fact, while the prosecutor's closing argument spanned twelve transcript pages, six of them were devoted to uninterrupted and improper victim impact statements, (TR 1400-1406), the use of which constitutes reversible error under established Ohio law. *See, e.g., State v. Gumm*, 653 N.E.2d 253, 263-64 (Ohio 1995) (trial court would be well within its discretion to sustain an objection to prosecutor's invitation to jury to "imagine" or speculate on aspects of the case not in evidence—*i.e.*, the victim's final thoughts).

Here, the emotionally charged statement about the deceaseds' final moments, which the experienced prosecutor had to know were inadmissible, inflamed the jury and likely resulted in Mr. Combs' unconstitutional death sentence. Even the Ohio Supreme Court acknowledged that the prosecutor improperly injected victim impact evidence as an aggravating factor and engaged in "gross speculation." *Ohio v. Combs*, 581 N.E.2d 1071, 1077 (Ohio 1991). A death sentence predicated on such

inflammatory and improper evidence is constitutionally unreliable. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988).

In addition, the prosecutor improperly transformed the nature and circumstances of the offense into a nonstatutory aggravating factor. In Ohio, a defendant must be found guilty of at least one statutorily defined "aggravating circumstance" as set forth in Ohio Rev. Code §§ 2929.04(A)(1) - (8). Only then is the defendant "death-eligible." The jury must weigh the applicable aggravating factors and mitigating circumstances. Prosecutors must not advise juries that the aggravating circumstances placed on one side of the balance included "everything" that surrounds this crime, or "all the nature and circumstances of this crime" or comparable phraseology. *See Gumm*, 653 N.E.2d at 263.

The prosecutor, however, did just that. For example, the prosecutor stated to the jury "you will find beyond a reasonable doubt that the aggravating circumstances, the horror, the terror that surrounded this crime outweigh any mitigation . . . ." (TR 1303-04.) The prosecutor also argued "you haven't heard any mitigating factors in this case to justify brutally and in cold blood murdering two people . . . ." (TR 1426.) These statements were misleading and prejudicial. The purpose of mitigating factors is not to justify, but to demonstrate that the defendant deserves a sentence less than death. Moreover, the prosecutor implied that the jury should weigh the mitigating factors against the "brutal" nature of the offense.

The prosecutor also improperly commented upon Mr. Combs' unsworn statement provided for the sentencing phase of the trial. When a capital defendant elects to make an unsworn statement, the prosecutor's comments are limited solely to the fact that the statement was not made under oath. *State v. DePew*, 528 N.E.2d 542, 554 (Ohio 1988). In commenting at great length upon the unsworn statement and how he was not being permitted to cross examine Mr. Combs, (TR 1419-20), the prosecutor violated Mr. Combs' Fifth Amendment rights as well as his statutory right to make an unsworn statement. Ohio Rev. Code § 2929.03(D)(1). This misconduct was not brief or isolated. In fact, the prosecutor

did not miss the opportunity to make the same point under the guise of pointing out that Mr. Combs had not established statutory mitigating factors. (TR 1398.) Again, the prosecutor's improper argument infected the sentencing phase rendering Mr. Combs' sentence unreliable.

Lastly, the prosecutor improperly addressed and emphasized certain aggravating circumstances. In contrasting one aggravating circumstance (Ohio Rev. Code § 2929.04(A)(5) (killing two people in the same course of conduct)) with inapplicable statutory aggravators, the prosecutor referred to this factor as "the one that is perhaps the most serious." (TR 1395.) This was improper, as the Ohio legislature has never declared one aggravating factor more serious than another. *See State v. Davis*, 528 N.E.2d 925, 936 (Ohio 1988).

While each of the individual instances cited above warranted reversal of Mr. Combs' capital sentence, this case did not involve one, or a few isolated brief episodes, of such constitutional misconduct. To put it simply, the jury considered Mr. Combs' sentence in an environment tainted by prosecutorial misconduct.

3. Trial Court Errors

The trial court also committed a host of constitutional errors, but perhaps none were so damning as the instruction that the jury could consider the "talk to my lawyer" statement as evidence that Mr. Combs' acted purposefully and with prior calculation and design. Indeed, immediately after Officer Ventre had concluded his testimony, the trial court *sua sponte*, instructed the jury as follows:

> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give to this testimony depends upon your findings and the weight that you attribute to his testimony in this regard so please remember that.

(TR 1052 (emphasis added).)

The trial court's instructions erroneously permitted the jurors to consider the statement as substantive evidence of Mr. Combs' guilt, in violation of his Fifth Amendment rights. *Miranda v. Arizona*, 384 U.S. 439 (1966); *see also Harris v. New York*, 401 U.S. 222, 224 (1971) ("*Miranda* barred the prosecutor from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel"); *Griffin v. California*, 380 U.S. 609, 615 (1965) (Fifth Amendment precludes prosecutor from using defendant's silence as substantive evidence of guilt). The jury was instructed to consider the statement on two elements—purpose and prior calculation and design—that were necessary to convict Mr. Combs of aggravated murder and render him eligible for the death penalty. *See* Ohio Rev. Code § 2903.01(A). It can hardly be argued that the instructions were harmless because Mr. Combs' intoxication, and its effect on his mental state, were crucial to his conviction and sentence of death.

The trial court also committed serious error during the sentencing phase by instructing the jury on all seven statutory mitigating factors rather than on only the two mitigating factors raised by Mr. Combs (TR 1434-36), in contravention of Ohio law. *DePew*, 528 N.E.2d at 557. The trial court's penalty phase charge encouraged the jury to infer that the existence of relatively few applicable statutory mitigators weighed in favor of the death penalty.

C. Appellate Errors

The responsibilities imposed on appellate counsel in a death penalty case are heavy. Where a forceful claim of error is omitted on direct appeal, the omission undermines a capital defendant's appellate rights by increasing the risk of procedural default or review under a more stringent plain error standard. Appellate counsel's obligation is thus to preserve claims as the client's very life is at stake. Yet, Mr. Combs' constitutional right to appellate review was rendered meaningless by the ineffective and inadequate representation that he received on direct appeal, in large part because he was represented by the same counsel who

mishandled his trial. Indeed, Mr. Combs' appellate counsel omitted several of the meritorious claims discussed *supra* relating to the ineffectiveness of trial counsel, trial court errors, and prosecutorial misconduct; errors of such constitutional magnitude that they should have been, but were not, raised by Mr. Combs' appellate counsel.[2] And many of the errors that trial counsel did raise on appeal were subject to the "plain error" standard because trial counsel had neglected to make the requisite objections at trial.

This situation would have been avoided had counsel merely acceded to his client's wishes that he step aside as counsel. The right to counsel under the Sixth Amendment entails "a correlative right to representation that is free from conflicts or interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1987). Such a right is violated when a defendant's attorney has a potential conflict of interest that results in prejudice to the defendant, or an actual conflict of interest that adversely affects the attorney's performance. *Id.* at 271-72. When Mr. Stidham failed to remove himself as appellate counsel upon Mr. Combs' request, an actual conflict of interest arose, as the attorney's and defendant's interest actually "diverge[d] with respect to a material factual or legal issue or to a course of action." *Cuyler v. Sullivan*, 446 U.S. 335, n.3 (1980).

D. The Ohio State Appellate Proceedings

Despite the constitutionally inadequate representation, on direct appeal the Ohio Supreme Court agreed that numerous errors were committed during the trial. First, the court recognized that trial court erred in failing to object to the prosecutor's use of the "talk to my lawyer" statement on at least one of three separate grounds. The court agreed that the statement stemmed from an improper custodial interrogation under *Miranda*. *Combs*, 581 N.E.2d at 1075-76. In addition, the court agreed that the prosecutor's use of

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[2] Although a few examples of ineffectiveness were assigned as error on direct appeal, the full panoply of trial counsel's errors and omissions was never placed before the appellate court.

the statement violated Mr. Combs' Fifth Amendment rights under *Griffin v. California*. *Id.* at 1076. The court also agreed that the statement was inadmissible under Rule 401 and 403 of the Ohio Rules of Evidence. *Id.*

Second, the court concluded that the trial court erred in allowing the "talk to my lawyer" statement into evidence and instructing the jury to consider the remark in relation to purpose and prior calculation and design. *Id.* Third, the court agreed that the prosecutor erred by improperly suggesting "that how the victims were killed and the suffering and mental anguish the victims endured was an aggravating circumstance." *Id.* at 1077. Yet, inexplicably, the court held that these errors did not rise to the level of "plain error," a standard which would not have applied but for the failure of trial counsel to make the requisite objections at trial. *Id.* at 1075-77. Two members of the court disagreed with the majority's decision, stating, "the prosecutorial misconduct graphically outlined by the majority simply cannot be passed off as harmless error beyond a reasonable doubt." *Id.* at 1084 (Wright, J., and Brown, J., dissenting).

E. The Federal Habeas Proceedings

After exhausting his state court remedies, Respondent sought habeas corpus relief in the federal courts. The United States District Court for the Southern District of Ohio denied habeas relief, agreeing with the Ohio Supreme Court that any error was harmless. The United States Court of Appeals for the Sixth Circuit reversed and ordered a conditional habeas writ, subject to a new trial. The Sixth Circuit initially discussed numerous trial counsel errors establishing ineffective assistance of counsel. First, the court held that Mr. Combs' Sixth Amendment rights were violated by trial counsel's failure to object to the prosecutor's use of the "talk to my lawyer" statement and the court's attendant instruction to the jury. *Combs*, 205 F.3d at 286-87. Agreeing with the Ohio Supreme Court, the Sixth Circuit found that Mr. Combs was in custody and entitled to *Miranda* warnings:

> Even assuming that the Fifth Amendment is inapplicable to precustody contexts, the privilege would still be applicable to Combs, for we agree with the Ohio Supreme Court's finding that Combs was in custody at the time he made the "talk to my lawyer" statement.

Id. at 284. The court also held that Mr. Combs' Fifth Amendment right to silence was also violated under *Griffin v. California*, when the prosecutor used the statement in the its case-in-chief to prove guilt. *Id.* at 286. The court also agreed that the statement was inadmissible under Ohio Rule of Evidence 403, stating that "a reasonable attorney would have known that the admission of the 'talk to my lawyer' statement was prejudicial and would have objected on the basis of Rule 403." *Id.* at 287.

The Sixth Circuit separately held that Mr. Combs' Sixth Amendment rights were violated by trial counsel's failure to anticipate, suppress, prepare for, object to or avoid repetition of Dr. Fisher's testimony on the issue of intent. The Sixth Circuit explained, "Fisher's opinion regarding whether Combs lacked the requisite intent to commit the crimes was crucial to the defense theory; defense counsel's failure to have questioned Fisher in this regard prior to trial is inexcusable. Defense counsel should have known Dr. Fisher's opinion on this ultimate issue and should have prepared accordingly." *Id.* at 288. According to the court, trial counsel's decision to put Dr. Fisher on the stand was "objectively unreasonable" as "Fisher's testimony destroy[ed] any hope of a successful intoxication defense" and actually "helped the prosecution to establish one of the elements of its case in chief." *Id.*

The Sixth Circuit also determined that trial counsel had committed numerous other errors. Two specific examples cited by the court concerned trial counsel's failure to i) investigate and present available physical evidence of Mr. Combs' intoxication on the day of the shootings, and ii) redact portions of the videotaped testimony of Tony Liming that were so prejudicial to Mr. Combs. *Id.* at 288-89. The occurrence of several other errors led the court to describe trial counsel's "overall performance" during the

culpability phase of the trial as "shocking." *Id.* at 289. Based upon its extensive analysis, the Sixth Circuit concluded that Mr. Combs was prejudiced by these numerous errors and that "absent defense counsel's errors, there is a reasonable probability that the jury would have concluded that the State did not meet its burden of proving the two contested elements, and thus that the jury would have had a reasonable doubt about Combs's guilt." *Id.* at 291.[3]

II. REASONS FOR DENYING THE PETITION

A. The Court Should Deny The Petition Because The Sixth Circuit's Decision Is Supported By The Totality Of Constitutional Deprivations

At the outset, what is simply ignored in the Petition is that the issues framed by Petitioner need not be reviewed by this Court because the Sixth Circuit's decision to grant Mr. Combs habeas relief was premised upon a totality of constitutional deprivations. While Petitioner attempts to create the impression that Mr. Combs' habeas petition was grounded on but two discrete errors, the record demonstrates the myopia of this position. To be sure, Mr. Combs was deprived of his constitutional rights by the admission of the "talk to my lawyer" statement and trial counsel's presentation of Dr. Fisher's expert testimony. However, the record before the Sixth Circuit established that every facet of Mr. Combs' trial and appeal was infected by gross violations of Mr. Combs' constitutional rights. Indeed, the pervasiveness of constitutional violations was not lost on the Sixth Circuit, which acknowledged the litany of errors committed by Mr. Combs' trial counsel, as well as the occurrence of prosecutorial misconduct and trial court errors.

The Sixth Circuit plainly recognized that Mr. Combs was subjected to a broad range of errors. At the outset, the Sixth

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[3] The Sixth Circuit did not confine its analysis to the claims of ineffective assistance of counsel, as it also found the trial court errors to be pervasive. *Combs*, 205 F.3d at 291-93.

Circuit found that trial counsel's failure to object to the "talk to my lawyer" statement as well as his presentation of Dr. Fisher's testimony, were independently sufficient to satisfy both the "deficiency" and "prejudice" components of the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Combs*, 205 F.3d at 288-90. The court then probed beyond these errors, devoting a separate section to trial counsel's "overall performance" during the culpability phase. *Id.* at 288-90. Here, the court concluded that there were numerous "other failures" on the part of trial counsel that compounded the most grievous of the errors. *Id.* at 289. By way of example, the court highlighted trial counsel's failure "to investigate and to present available physical evidence of Combs's intoxication on the day of the shootings." *Id.* The Sixth Circuit explained that trial counsel failed to investigate and discover the presence of alcohol containers in the car, depriving Mr. Combs of the ability to present crucial corroborating physical evidence of intoxication.[4] *Id.*

As a second example, the court noted trial counsel's failure to attempt to redact prejudicial portions of Tony Liming's videotaped deposition testimony. *Id.* Specifically, the court explained that Liming's references to Mr. Combs "stealing stuff" was excludable under Ohio Rule of Evidence 404(B), which precludes the admission of evidence of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." *Id.*; Ohio R. Evid. 404(B). The court concluded that, "considering the potential prejudice from the statement, counsel clearly erred by failing to seek redaction." *Combs*, 205 F.3d at 289.

Thus, it is clear that the Sixth Circuit recognized the constitutionally deficient representation afforded to Mr. Combs during his trial and appeal. Indeed, this is precisely what led the court to describe trial counsel's "overall performance" as "shocking." *Id.*

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[4] As the Sixth Circuit noted, trial counsel failed to present any corroborating physical evidence at trial. *Combs*, 205 F.3d at 289, n.13.

In addition to recognizing the failings of trial counsel, the Sixth Circuit also acknowledged the existence of prosecutorial misconduct and errors by the trial court. The court agreed that the trial court erred by providing jury instructions on all seven of the statutory mitigating factors, as opposed to only the two mitigating factors raised by Mr. Combs. *Id.* at 292. The court also agreed that the prosecutor committed error by focusing its closing remarks on the victim's mental anguish prior to death, thereby converting the nature and circumstances of the offense into a nonstatutory aggravating circumstance. *Id.* In fact, the court found these errors were so serious so as to admonish the prosecutor to "avoid such speculation at retrial." *Id.* at 293.

In short, Petitioner's efforts to recast the record aside, the Sixth Circuit found meritorious claims relating to three crucial categories of error—ineffective assistance of counsel, prosecutorial misconduct and trial court errors.

B. The Court Should Deny The Petition Because The Sixth Circuit Held That Errors Concerning Both The "Talk To My Lawyer" Statement And The Presentation Of Dr. Fisher's Testimony Constituted Independent Violations Of Mr. Combs' Sixth Amendment Rights

Even if this case was, as Petitioner blindly claims, confined to but the two errors, certiorari review would still be inappropriate. While recognizing that the "overall performance" of Mr. Combs' trial counsel was "shocking," the Sixth Circuit focused primarily on two of the more grievous errors committed by trial counsel: i) the failure to object to the "talk to my lawyer" statement; and ii) the presentation of Dr. Fisher's testimony. The Sixth Circuit expressly held that each of these two errors constituted an independent violation of Mr. Combs' Sixth Amendment rights. *Id.* at 288-89. Thus, for example, even if trial counsel's failure to object to the "talk to my lawyer" statement somehow did not violate Mr. Combs' Sixth Amendment rights, the Sixth Circuit would nevertheless have granted habeas relief based solely on trial counsel's failure to anticipate, suppress, prepare for, object to or

avoid repetition of the damning testimony of Dr. Fisher.[5] As review of but one of the two questions presented would result in the court rendering an advisory opinion, the Petition should be denied.

C. The Court Should Deny The Petition On The First Question Presented Because Independent Bases Exist For Concluding That Trial Counsel's Failure To Object To The "Talk To My Lawyer" Statement Deprived Mr. Combs Of His Sixth Amendment Rights

Petitioner contends that trial counsel's failure to object to the "talk to my lawyer" statement could not have constituted ineffective assistance of counsel under *Strickland* because, according to Petitioner, the prosecutor's use of "pre-*Miranda*" silence as part its case-in-chief did not violate Mr. Combs' Fifth Amendment rights. In other words, trial counsel could not have been ineffective in failing to make an objection that was legally infirm. However, Petitioner ignores the fact that there were at least two independent objections that trial counsel clearly should have made in connection with the "talk to my lawyer" statement, irrespective of whether an objection based upon the Fifth Amendment question presented by Petitioner was meritorious.

1. Failure To Object Based On *Miranda* Warnings Violation

First, the prosecutor's use of the "talk to my lawyer" statement was objectionable because the statement was the fruit of a custodial interrogation that occurred before Officer Ventre provided Mr. Combs the required *Miranda* warnings. Thus, the instant case is fundamentally different from the line of so-called "pre-*Miranda*" silence cases embraced by Petitioner because it

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[5] Indeed, Circuit Judge Norris did just that when he concurred with the majority's decision to issue a writ of habeas corpus based solely on trial counsel's presentation of Dr. Fisher's testimony. *Combs*, 205 F.3d at 293 (Norris, J., concurring in part and dissenting in part).

involves a situation where *Miranda* warnings were not given, but were required. In *Miranda*, the Court held that statements made in response to interrogation while an individual is in custody are inadmissible unless the suspect is specifically informed of his *Miranda* rights and voluntarily elects to forgo those rights. 384 U.S. at 478-79. Thus, the central inquiry under *Miranda* is whether the suspect was in custody (and therefore entitled to *Miranda* warnings) at the time of interrogation.

In the instant case there is no dispute that Mr. Combs was in custody at the time Officer Ventre asked Mr. Combs "What happened?" and elicited the "talk to my lawyer" statement. Both the Ohio Supreme Court and the Sixth Circuit reached this inescapable conclusion; and Petitioner expressly conceded the issue in the Petition. (Pet. at 8, n.5.) Having determined that Mr. Combs was in custody, the Ohio Supreme Court and Sixth Circuit had no trouble concluding that, at the time Officer Ventre elicited the "talk to my lawyer" statement, Mr. Combs was entitled to *Miranda* warnings. The Ohio Supreme Court explained:

> [A]t the point when Combs was placed in the ambulance, we find that Combs was in custody and had a right to remain silent, consult a lawyer, and receive a *Miranda* warning. When he arrived at the scene, Officer Ventre personally took the shotgun from Combs; there were two women dead from the shotgun blasts in the adjacent car; and Ventre had been at the scene for some ten to fifteen minutes. Ventre's questioning, without a *Miranda* warning, violated those rights.

Combs, 581 N.E.2d at 1075-76 (emphasis added); *see also Combs*, 205 F.3d at 284-85 (explaining that *Miranda* warnings were required under circumstances presented).

Because Mr. Combs was entitled to, but failed to receive, *Miranda* warnings prior to being asked "What happened?," the response of "talk to my lawyer" was plainly inadmissible at trial. Thus, even assuming that trial counsel had no basis for objecting to the statement based on the Fifth Amendment question presented by Petitioner, he should have recognized that Mr. Combs had been

subjected to an improper custodial interrogation in violation of *Miranda*, and made the appropriate objection.

Recognizing that the presence of a *Miranda* warnings violation renders the first question presented moot, Petitioner contends that the "public safety exception" to *Miranda* somehow salvages its position. At the outset, Petitioner never raised this argument below, and thus it has been waived. *Aurer v. Robbins*, 519 U.S. 458, 464 (1997); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). Regardless, neither the record nor the law supports Petitioner's eleventh hour attempt to disprove the existence of a *Miranda* warnings violation.

In *New York v. Quarles*, 467 U.S. 649 (1984), the sole case cited by Petitioner in support of its theory, the Court found that no violation of defendant's constitutional right had occurred when, immediately after placing the defendant in custody but before giving him *Miranda* warnings, officers asked the defendant the location of a gun that the officers knew he had hidden. *Id.* at 655-56. The Court explained that the need to eliminate the danger to public safety posed by the hidden gun took precedence over the suspect's constitutional right against self-incrimination. *Id.* at 657.

The instant case is readily distinguishable from the circumstances presented in *Quarles*. First, in *Quarles* the officers actually knew when they interrogated the suspect that he had hidden his weapon. *Id.* at 652. Here, when asking the offensive question, the officer had no specific knowledge of any public safety concern, such as a hidden gun. Second, in *Quarles* the officer immediately asked the defendant where the gun was upon taking him into custody. *Id.* Here, however, several minutes passed from the time that the officer disarmed Mr. Combs to the time that the officer asked the offensive question. Again, there is no evidence in the record that a legitimate public safety concern existed at the time of the question.

Third, in *Quarles* the officer asked only the question that was necessary to locate the concealed gun (*i.e.*, "where's the gun?) and quell the public safety concern. *Id.* at 649. Here, the officer's

question was anything but pointed. The question failed to address any specific public safety concern, and the breadth of the question makes clear that it was motivated by nothing more than a general desire to gather facts from the suspect. Finally, that the officer did not ask Mr. Combs any follow up questions addressing a particular public safety matter (*e.g.*, "Are there any other weapons?") serves to confirm that his question was not intended to address a legitimate fear for public safety. (TR 1046.) These crucial distinctions make clear that the public safety exception has no application here.

2. Failure To Object Based Upon The Ohio Rules of Evidence

Second, even if trial counsel failed to realize that the prosecutor's use of the "talk to my lawyer" statement constituted a *Miranda* warnings violation, trial counsel should still have objected to the statement on evidentiary grounds. Rule 403 of the Ohio Rules of Evidence provides that evidence, although relevant, must be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Ohio R. Evid. 403(B). Here, despite the obvious prejudice posed by the prosecutor's use of the "talk to my lawyer" statement to prove prior calculation and design and purpose, trial counsel failed to seek exclusion of the statement under Rule 403(B). The Ohio Supreme Court and the Sixth Circuit both concluded that trial counsel erred in failing, at a minimum, to object to the "talk to my lawyer" statement under Rule 403.[6] The Sixth Circuit stated, "[a] reasonable defense attorney would have known that the admission of the talk to my

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[6] Petitioner states, without support, that the Ohio Supreme Court's holding is irrelevant because the court concluded that the error was "harmless." However, the Sixth Circuit clearly disagreed, concluding not only that the failure to object on evidentiary grounds was error, but also that the failure to make any objection at all satisfied the "prejudice" prong of *Strickland*. *Combs*, 205 F.3d at 290. Moreover, Petitioner ignores the fact that, because trial counsel was deficient in failing to object, the Ohio Supreme Court was forced to examine the issue under the "plain error" standard.

lawyer statement was prejudicial to the client and would have objected on the basis of Rule 403." *Combs*, 205 F.3d at 287. The Ohio Supreme Court reached a similar conclusion, stating, "Even if [the 'talk to my lawyer' statement] was initially admissible, Evid. R. 401 and 403 would otherwise invite exclusion from evidence." *Combs*, 581 N.E.2d at 1076.

It has been this Court's consistent rule "never to anticipate a question of constitutional law in advance of the necessity of deciding it . . . and never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Moreover, the Court has long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Here, because the Ohio Supreme Court and the Sixth Circuit correctly recognized that two additional bases existed for objecting to the use of the "talk to my lawyer" statement, one of which involved the application of non-federal evidentiary rules, the Fifth Amendment question presented by Petitioner is not ripe for review.

D. The Court Should Deny The Petition On The First Question Presented Because The Case Does Not Present An Issue On Which There Exists A Conflict Among The Courts Of Appeals

Petitioner insists that there is a conflict among the courts of appeals that warrants review. According to Petitioner, ". . . the courts of appeals are sharply divided on the question whether pre-*Miranda* silence may be used in a prosecution's case-in-chief." (Pet. at 15.) However, closer scrutiny reveals that there is no conflict relating to any issue presented by this case.

First and foremost, this is not a "pre-*Miranda* silence" case; rather, this case involves the failure to provide *Miranda* warnings before a custodial interrogation. Thus, the case concerns whether

the prosecution may use as substantive evidence of guilt statements made in response to a custodial interrogation before *Miranda* warnings have been provided. Clearly the answer in this case is no, and Petitioner cites no authority to the contrary.

Second, even the purported "conflict" among the circuits on the Fifth Amendment question framed by Petitioner is illusory. While Petitioner has cobbled together decisions from various courts of appeals, the cases lack any common legal or factual thread relevant to the instant record. Most notably, Petitioner has admitted that Mr. Combs was in custody at the time he was questioned. (*See* Pet. at 8, n.5 ("We do not dispute that Combs was in custody when he made [the 'talk to my lawyer'] response").) Having done so, this case ceases to be a pre-arrest, pre-*Miranda* case. Thus, the pre-arrest silence cases relied upon by Petitioner to support its purported "conflict" are all inapposite. *See, e.g.*, *United States v. Zanabria*, 74 F.3d 590 (5th Cir. 1996); *United States v. Rederth*, 872 F.2d 255 (8th Cir. 1989); *United States v. Williams*, 405 F.2d 14 (4th Cir. 1968).

The remaining cases relied upon by Petitioner similarly do not support the proposition that silence can be used as substantive evidence of guilt. For example, in *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990), the narrow holding was simply that *Wainwright v. Greenfield*, 474 U.S. 284 (1986), precluded the prosecution from using the defendant's post-*Miranda* silence as evidence of sanity. *Thomas*, 910 F.2d at 1417. Moreover, a year later the Seventh Circuit held that post-arrest, pre-*Miranda* silence could not be used by the prosecution as substantive evidence of guilt in its case-in-chief. *United States v. Hernandez*, 948 F.2d 316, 322-23 (7th Cir. 1991).

The Fourth Circuit's decision in *United States v. McNatt*, 931 F.2d 251 (4th Cir. 1991) was not even a Fifth Amendment right to silence case, but rather turned exclusively on the Fourth Amendment. *McNatt*, 931 F.2d at 256. Similarly, *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991), was not decided on Fifth Amendment grounds as the defendant raised only a due process challenge. *Rivera*, 944 F.2d at 1567-69. Moreover,

Rivera relied exclusively on *Jenkins v. Anderson*, 447 U.S. 231 (1980), and *Fletcher v. Weir*, 455 U.S. 603 (1982), which are impeachment cases and do support the proposition that silence can be used as substantive evidence of guilt in the prosecution's case-in-chief. *Id.* at 1568, nn.11, 12.

In *United States v. Isaac*, 134 F.3d 199 (3d Cir. 1998), the Third Circuit did not analyze the type of "silence" at issue (*i.e.*, pre-arrest, pre-*Miranda* or post-*Miranda*). *Isaac*, 134 F.3d at 206-07. Moreover, the court explained that the prosecutor's comment was vague and "was not 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Id.* at 207. The court also cautioned that the prosecutor was permitted to comment upon a defendant's silence only because defense counsel attacked the credibility of the prosecution's witnesses. *Id.* The court explained that "when the defendant uses his *Griffin* protection as a sword, rather than a shield, the prosecution may respond appropriately." *Id.* Here, it is undisputed that the prosecutor's statement directly implicated Mr. Combs' right to silence. Futhermore, Mr. Combs never used his silence as a sword, requiring the prosecutor to respond.[7]

Finally, the only cases mentioned by Petitioner that even arguably resemble this case all confirm that post-arrest, pre-*Miranda* silence cannot be used in the prosecution's case-in-chief to prove guilt under the principles set forth in *Griffin* and *Miranda*. *See, e.g.*, *United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000) ("when district court admitted evidence of

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[7] Petitioner contends that the use of the "talk to my lawyer" statement was permissible, in part, because the prosecutor used it as so-called "rebuttal" evidence. (Pet. at 13-15.) This distinction is without merit. Whatever the appropriate rubric may be, there is no dispute that the prosecutor used the statement in its case-in-chief as substantive evidence of guilt, *i.e.*, to show that Mr. Combs acted rationally and thus with purpose and intent. There is no authority for the proposition that the mere assertion of a defense is sufficient to open the door for the admission of otherwise inadmissible evidence of silence.

post-arrest, pre-*Miranda* silence, and when it allowed the government to comment on this silence in closing argument, it plainly infringed upon [the defendant's] privilege against self-incrimination"); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) ("custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*. Any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant"); *Hernandez*, 948 F.2d at 322 (holding that government may not use defendant's post-arrest, pre-*Miranda* silence against him as evidence of guilt).

E. The Court Should Deny The Petition On The Second Question Presented Because The Sixth Circuit's Finding Of Prejudice Raises No Novel Issues Under *Strickland* And Is Fully Supported By The Record

Lastly, Petitioner questions whether the Sixth Circuit correctly applied the two-part test announced in *Strickland* for evaluating claims of ineffective assistance of counsel. (Pet. at 19-26.) Petitioner insists that the Sixth Circuit erred in finding that the prejudice component of the *Strickland* test was satisfied by trial counsel's deficient handling of Dr. Fisher's testimony.[8] Under *Strickland*, the prejudice inquiry "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. Further, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Petitioner contends that *Strickland's* "reasonable probability" test should be set aside. However, this issue was resolved in

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[8] Petitioner's discussion of Dr. Fisher's testimony as it pertains to prejudice ignores the Sixth Circuit's holding that trial counsel's failure to object to the "talk to my lawyer" statement was independently sufficient to satisfy the prejudice component under *Strickland*. *Combs*, 205 F.3d at 290.

Williams v. Taylor, 120 S. Ct. 1495 (2000), where the Court reaffirmed that the *Strickland* two-part test—including the "reasonable probability" standard—remains the law. *Id.* at 1512. The Court also rejected the need for a separate fundamental fairness inquiry. *Id.* at 1513.

The Court's decisions in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and *Nix v. Whiteside*, 475 U.S. 157 (1986), in no way warrant departing from *Strickland's* prejudice test in this case. These decisions simply recognize that the mere fact that the outcome of a trial may have been different but for counsel's behavior is not determinative of a Sixth Amendment violation where the behavior does not deprive the defendant of a right that he is actually entitled to under the law. For example, in *Lockhart*, the court held that prejudice was not demonstrated where the claimed ineffective assistance consisted of trial counsel's failure to make an objection during trial on a basis that was ultimately determined to be legally infirm. *Lockhart*, 506 U.S. at 372-73 (noting that case "concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry") (O'Connor, J., concurring). Similarly, in *Nix* the Court found no prejudice where the claimed ineffective assistance consisted of trial counsel refusing to assist the defendant in presenting perjured testimony. *Nix*, 475 U.S. at 175; *see also Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) (noting that "a meritorious Fourth Amendment claim is necessary to the success of a Sixth Amendment claim").[9]

Here, Mr. Combs undoubtedly had a right to have his attorney investigate the opinions of his only expert on the sole defense proffered. *See Strickland*, 466 U.S. at 691 ("counsel has a duty to

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[9] Justice Powell's concurrence in *Kimmelman*, and the Seventh Circuit's decision in *Holman v. Page*, 95 F.3d 481 (7th Cir. 1996), concerned Fourth Amendment considerations relating to the admission of physical evidence that are not present in this case. *Kimmelman*, 477 U.S. at 391-92 (Powell, J., concurring); *Holman*, 95 F.3d at 490-91.

make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *see also Williams*, 120 S. Ct. at 1514-15 (ineffective assistance based on trial counsel's failure to investigate).[10] Additionally, unlike *Lockhart*, there remains a well-established legal basis for objecting to Dr. Fisher's testimony on the ultimate issue. *State v. Slagle*, 605 N.E.2d 916, 927 (Ohio 1992) (holding that opinion testimony on ultimate issue of specific intent is inadmissible during guilt phase of criminal trial).

Apart from contending that the Sixth Circuit should have applied a modified *Strickland* analysis, Petitioner is left arguing that the Sixth Circuit's decision was erroneous based on the particular facts of the case. Petitioner has identified no conflict among the courts of appeals on an issue of fact presented by this case concerning prejudice under *Strickland*. Certiorari review is ordinarily not appropriate when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Nevertheless, there is no doubt that the Sixth Circuit properly applied the *Strickland* prejudice test. Petitioner's query—"Can it count as prejudicial under *Strickland* that a defense witness on cross-examination provides testimony that confirms the defendant's guilt?" (Pet. at 19)—unfairly diminishes the devastating effect that Dr. Fisher's testimony had on Mr. Combs' intoxication defense. First, Dr. Fisher was not just any defense witness—he was Mr. Combs' expert witness, and, indeed, the only expert witness providing testimony on Mr. Combs' behalf on the only defense proffered. Second, the testimony elicited was not just any testimony, but rather went to the ultimate issue of the

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[10] The Court in *Williams* did not distinguish between so-called exculpatory and inculpatory evidence, nor has Petitioner identified a conflict among the circuits on such a basis. In any event, *Williams* did not, as Petitioner suggests, involve "exculpatory" evidence, but rather concerned trial counsel's failure to investigate and present mitigation evidence during the sentencing phase. *Id.* at 1514.

case—Mr. Combs' intent. In essence, Dr. Fisher testified that Mr. Combs had no legitimate defense. Third, the testimony did not merely "confirm" guilt; it actually helped the prosecutor establish the elements of its case-in-chief.[11]

While the gravity of trial counsel's errors somehow escaped Petitioner, they were not lost on the Sixth Circuit, which correctly recognized that Dr. Fisher's testimony, as well as the "talk to my lawyer" statement, completely undermined Mr. Combs' ability to establish the absence of intent and purpose, and altered the entire evidentiary landscape of Mr. Combs' defense. *Combs*, 205 F.3d at 290-91. At the same time, the court fully appreciated the prosecutor's heavy reliance upon this evidence to establish intent. *Combs*, 205 F.3d at 279, 288-89.

The remaining evidence that the prosecutor submitted on purpose and intent was far less probative and, as the Sixth Circuit noted, was squarely refuted by credible testimony that Mr. Combs was suicidal. *Combs*, 205 F.3d at 290. Moreover, Petitioner ignores the fact that other errors committed by trial counsel (*e.g.*, the failure to investigate the existence of corroborating physical evidence) prevented Mr. Combs from marshaling an even stronger intoxication defense. *Williams*, 120 S. Ct. at 1515. In short, the record before the Sixth Circuit fully supported the court's conclusion that, but for trial counsel's errors, "there was a reasonable probability that the jury would have concluded that the State did not meet its burden of proving" the elements of its case. *Combs*, 205 F.3d at 291.

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[11] The fact that Dr. Fisher was a defense witness is irrelevant. Trial counsel did not make a strategic decision to call a witness knowing that the witness might provide unfavorable testimony on cross-examination. Rather, trial counsel admitted that, due to his failure to investigate, he had no idea Dr. Fisher believed that Mr. Combs acted with purpose and intent. *Combs*, 205 F.3d at 288.

III. CONCLUSION

For all of these reasons, the Petition should be denied.

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No. 00-312

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In the

Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,

Petitioner,

v.

RONALD DEAN COMBS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ARKANSAS, DELAWARE, IDAHO, LOUISIANA, MAINE, NEBRASKA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This case addresses two interrelated issues. The first of these issues is whether the reliability of the criminal process is enhanced by allowing prosecutors to use pre-*Miranda* statements to rebut a defense of mental incapacity. The Court's decision on this issue will eliminate long-standing conflict over what some state supreme courts and federal courts of appeal consider a legitimate government practice, and others view as a violation of the fifth amendment. The Court's resolution of this question will affect the day-to-day criminal investigation by state and local police officers as well as the effective prosecution based upon the evidence obtained in these investigations. The second issue is whether the reliability of the criminal process is enhanced by finding that the concept of *Strickland* prejudice is not violated by evidence which merely confirms the defendant's guilt. As the States' chief law enforcement officers, the undersigned Attorneys General have a direct and significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

The Fifth Amendment expressly protects against compelled self-incrimination. Through its opinions, this Court has recognized that compelled silence, similarly, is protected by the Fifth Amendment. However, the Court has explicitly left open the question of whether or under what circumstances silence which is not compelled is protected by the Fifth Amendment. Left unsettled, this question has resulted in direct conflict among the circuit courts of appeal. The undecided question is squarely presented by the first question presented in the instant case.

The Fifth Amendment concern here requires an answer to whether, as some circuits and state supreme courts hold, there exists an absolute right to remain silent, or whether,

as other courts hold, it is necessary to strike a balance between the policies underlying an individual's constitutional right to remain silent and society's legitimate interest in law enforcement. Those courts which allow the government to comment on a defendant's silence find that there is no impermissible burden on the Fifth Amendment when the silence either (1) occurred prior to the receipt of *Miranda* warnings or (2) was a fair comment used to rebut or respond to an argument or defense. On balance here, Respondent's pre-*Miranda* statement used to rebut an affirmative defense of mental incapacity should not be found violative of the Fifth Amendment.

Since the notion of an absolute right to silence appears to have been undermined by more recent case law, and since the practical utility of using a pre-*Miranda* statement to rebut an incapacity defense is consistent with precedent which allows pre-*Miranda* silence to impeach a defendant's testimony, this Court should answer the question left unanswered by its current decisions. Resolution of this question would impact the amici states' significant interest in presenting relevant evidence which would serve to promote the truthfinding function of criminal prosecutions.

Similarly, the second question presented also concerns the truthfinding process of a criminal trial. Specifically, answering this question will serve to further define the contours of *Strickland* prejudice and what factors ought not to inform that inquiry. In analyzing an ineffective assistance of counsel claim, the Court has eschewed mechanical application of its rules in favor of a focus on whether the proceeding was rendered fundamentally unfair or the verdict unreliable. The prosecution's cross-examination here did not render the proceeding unfair or the verdict unjust because it merely provided evidence which confirmed the defendant's guilt. The contrary finding by the lower court should be regarded as a windfall to the defendant rather

than the legitimate prejudice contemplated by the Court's opinion in *Strickland*. Should the lower court's decision stand uncorrected, it will chill the effective advocacy of state prosecutors and frustrate what this Court has recognized as the government's chief purpose in a criminal trial—seeking a judgment resting on truth.

Moreover, it should have been apparent to the lower court that there was no reasonable probability of acquittal based upon the facts of record. Overwhelming evidence was presented at trial which established the requisite intent and premeditation such that, even absent the evidence that the Respondent claimed should not have been presented, there was no reasonable likelihood of acquittal.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve the longstanding conflict over whether the Fifth Amendment allows use of pre-*Miranda* silence for purposes other than impeachment.

Recently, this Court expressly stated that "no constitutional rule is immutable" since "[n]o court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it." *See Dickerson v. United States*, ___ U.S. ___, 120 S.Ct. 2326, 2335 (2000) (discussing the constitutionality *vel non* of the warnings of *Miranda v. Arizona*, 384 U.S. 436 (1966)). Consistent with this statement, the contours of the right to silence protected by the Fifth Amendment have been refined by the Court's decisions over time. Initially, the Court recognized an absolute right to silence. *Griffin v. California*, 380 U.S. 609, 613-15 (1965). However, subsequent decisions have clarified that the right may yield under certain circumstances. *See Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980) (impeachment use of prearrest, pre-*Miranda* warnings silence does

not offend the Fifth Amendment); *see also Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (impeachment use of post-arrest, pre-*Miranda* warnings silence does not offend due process). The first question presented by the petition for writ of *certiorari* seeks to resolve a question, left unanswered by the Court's decision in *Wainwright v. Greenfield*, 474 U.S. 286, 295 (1986). While that decision clarified that the use of post-arrest, post-*Miranda* silence as evidence of sanity violated due process, *id.* at 295, the Court has explicitly left open "whether or under what circumstances prearrest [or pre-*Miranda*] silence[1] may be protected by the Fifth Amendment." *Jenkins*, 447 U.S. at 236 n. 2. The court's silence on this question has led the circuit courts of appeal to develop two conflicting lines of caselaw.

The importance of the question left open by this Court's decisions is clear. Every day, people are questioned in the course of police investigations before arrests are made or suspects are named. Much of this investigation necessarily occurs prior to *Miranda* warnings being given. As a result, *Griffin* and its progeny provide state prosecutors with no guidance in analyzing any resulting pre-*Miranda* statements. Nor do these cases shed any light on the specific question presented by Petitioner—whether a defendant's constitutional privilege against self-incrimination is impermissibly burdened by the use of a pre-*Miranda* statement to rebut a claim of mental incapacitation. Guidance on this question is essential because both the state appellate courts and the federal circuit courts of appeal are sharply divided on the utility of these statements and the constitutional rights contained in the Fifth Amendment should be uniformly applied by states and circuit courts alike. The

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[1] Even if the word "silence" is construed to mean a spoken invocation of the privilege against self-incrimination, like that involved in the instant case, *Jenkins* speaks only to the use of prearrest silence for impeachment purposes.

split among both state appellate courts and the federal circuits on this significant question of constitutional law requires resolution.

A. The *Griffin* - *Jenkins* split

The split among the circuits/state courts may be attributed to the lower courts' reliance upon one of two decisions. Those circuits or state courts that favor exclusion of prearrest silence rely on the Court's suggestion in *Griffin*, that the Fifth Amendment guarantees an absolute right to remain silent.[2] *Griffin*, 380 U.S. at 613-15 (holding that a

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[2] Circuits favoring the exclusion of prearrest silence include the first (*Coppola v. Powell*, 878 F.2d 1562, 1565-66 (1st Cir.), *cert. denied, Powell v. Coppola*, 493 U.S. 969 (1989)); the ninth (*United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000), *cert. denied, Whitehead v. United States*, 2000 U.S. LEXIS 6033 (U.S. Oct. 2, 2000)); the tenth (*United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), *cert. denied, Burson v. United States*, 503 U.S. 997 (1992)); and D.C. (*United States v. Moore*, 322 U.S. App. D.C. 334, 104 F.3d 377, 389 (D.C. Cir.), *reh'g en banc denied*, 324 U.S. App. D.C. 53, 110 F.3d 99 (1997)); *but see* pg. 9-10, *infra*, (for a list of circuits which permit prosecutorial comment on a defendant's silence). Similarly, the following states appellate courts have held that the use of pre-arrest, pre-*Miranda* silence to infer guilt violates a defendant's Fifth Amendment right to remain silent: *Hartigan v. Commonwealth*, 31 Va. App. 243, 522 S.E.2d 406, 409-410 (Va. App. 1999), *reh'g granted* 31 Va. App. 511, 525 S.E.2d 9 (2000), *and on reh'g en banc, remanded on other grounds*, 32 Va. App. 873, 531 S.E.2d 63 (2000); *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (Ida. 1998); *State v. Easter*, 130 Wash. 2d 228, 922 P.2d 1285 (Wash. 1996); *Tortolito v. State*, 901 P.2d 387 (Wyo. 1995); *State v. Palmer*, 860 P.2d 339 (Utah App.), *cert. denied*, 868 P.2d 95 (Utah 1993); *State v. Dunkel*, 466 N.W.2d 425, 428-29 (Minn. Ct. App. 1991); *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (Neb. 1990); *People v. De George*, 73 N.Y.2d 614, 543 N.Y.S.2d 11, 541 N.E.2d 11, 13 (N.Y. 1989); *but see* n. 6, *infra* (for a list of state courts which have held that evidence of an accused's prearrest

(continued...)

section of the California state constitution that allowed a prosecutor to comment on a defendant's refusal to testify violated the Fifth Amendment). Although the *Griffin* approach supports a prohibition against substantive use of prearrest silence, *Griffin* itself does not address the use of prearrest silence. Moreover, the Court's subsequent decisions appear to have so undermined *Griffin* that the Court would be unlikely to use that decision to preclude the use of pre-*Miranda* silence for purposes of rebuttal.

1. Erosion of *Griffin*'s absolute Prohibition

In more recent decisions, this Court appears to have cast doubt on *Griffin*'s "penalty doctrine."[3] Suggesting that the Fifth Amendment does not guarantee an absolute right to silence, the Court has held that the Constitution does not prohibit every government action that might penalize the exercise of the privilege. The Court has subsequently maintained that the criminal justice process properly requires defendants to make difficult choices.[4] For example,

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[2] (...continued)
silence does not violate the Fifth Amendment in the absence of government compulsion to speak or remain silent prior to arrest).

[3] What has come to be known as the "penalty doctrine" evolved from the *Griffin* court's explanation that comment by a prosecutor on a defendant's failure to take the stand violates the Fifth Amendment because it "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614.

[4] *See McGautha v. California*, 402 U.S. 183, 213 (1971) (explaining that the criminal justice process often requires defendants to make difficult choices and that the Constitution does not forbid the government from requiring these choices); *see also* Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 Wm & Mary L Rev 285, 313 (1988)
(continued...)

in *McGautha v. California*, 402 U.S. 183 (1971), the Court held that a single jury may constitutionally both decide a defendant's guilt and determine his sentence. The defendant had argued that the determination of guilt and punishment at a single trial violated the privilege against self-incrimination, because such a practice discourages the defendant from remaining silent at the culpability stage of the trial for fear that, if found guilty, the jury will sentence him without having heard from him. *Id.* at 213. Although the Court acknowledged that, in a single-verdict trial, the defendant may be pressured into taking the stand, the Court held that the penalty for remaining silent is not sufficiently serious to violate the Fifth Amendment. Similarly, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that the Constitution permits officials at a prison disciplinary hearing to draw an adverse inference from an inmate's refusal to testify. The Court refused to extend the *Griffin* rule to disciplinary hearings because the stakes are not as high as in criminal trials, and the use of silence does not constitute as serious a penalty. *Id.* at 318-19.

Most notably, the Court in *Jenkins* allowed the prosecution to impeach the defendant's testimony with his prearrest silence, explaining that while such use clearly burdened the exercise of the privilege, the extent of the burden was not impermissible under the dictates of the Fifth Amendment. *Jenkins*, 447 U.S. at 238. Although *Griffin*, unlike *Jenkins*, applies to substantive use of a defendant's silence, the Court's recent treatment of the *Griffin* "penalty doctrine" may indicate that *Griffin* would not be extended to support exclusion of a defendant's pre-*Miranda*

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[4] (...continued)
(explaining that this Court has always been careful to make a distinction between forcing a defendant to make a difficult choice, which is acceptable, and governmental compulsion, which is not).

statement used as rebuttal evidence to a defense of mental incapacity.[5] The *Jenkins* rule, unlike *Griffin*, applies to prearrest silence and has not been undercut by this Court.

2. Application of *Jenkins'* impermissible burden test

Circuits and state appellate courts that favor admitting prearrest silence as evidence of guilt rely on the Court's more recent holding in *Jenkins*. *Jenkins* declined to follow the view that the Fifth Amendment provides an absolute right to silence, holding instead that courts must employ an "impermissible burden" test to determine the constitutionality of impeachment use of prearrest silence. The *Jenkins* "impermissible burden" test provides the most relevant source of analysis for determining whether prosecutorial use of a pre-*Miranda* statement to rebut a defense of mental incapacity violates the Fifth Amendment.

In *Jenkins*, the Court stated that although the potential use of prearrest silence may deter a defendant from remaining silent prior to arrest, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins*, 447 U.S. at 236 (*quoting Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)). Instead, the Constitution forbids only those practices that place an "impermissible burden" on the exercise of those rights. Thus, the Court introduced a balancing test that requires courts to deter-

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[5] In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), this Court prohibited impeachment use of post-arrest silence. Therefore, a straightforward application of *Griffin*'s "penalty doctrine" would have resolved the issue. However, the *Doyle* Court did not mention *Griffin* or the Fifth Amendment issues. The Court's failure to rely on *Griffin* suggests that the "penalty doctrine" is not sufficiently vital to support exclusion of a defendant's silence outside the courtroom.

mine whether the Constitution forbids a government practice by weighing "the legitimacy of the challenged governmental practice" against "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Jenkins*, 447 U.S. at 236-38 (*quoting Chaffin*, 412 U.S. at 32). Thus, under the impermissible burden test, not every government practice that discourages defendants from remaining silent is unconstitutional.

Several circuits permit the government to comment on a defendant's "silence" if it occurred, as it did in the case at bar, prior to the time that he was arrested and given his *Miranda* warnings. *See United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (no Fifth Amendment violation where silence at issue was neither induced by nor a response to any action by a government agent); *United States v. Rivera*, 944 F.2d 1563, 1568, 1568 n.12 (11th Cir. 1991) (government may "unquestionably" comment on defendant's silence post-arrest because she had not yet received *Miranda*'s "implicit assurances"); *Thomas v. Indiana*, 910 F.2d 1413, 1416 (7th Cir. 1990) (testimony about defendant's request for an attorney did not violate *Greenfield* since request was made before defendant was given his *Miranda* warnings); *United States v. Rederth*, 872 F.2d 255, 258 (8th Cir. 1989) (*Doyle* and its progeny were not violated where defendant was not given affirmative governmental assurances that his silence would not be used against him).[6]

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[6] Several state courts have also held that evidence of an accused's prearrest silence does not violate the Fifth Amendment in the absence of government compulsion to speak or remain silent prior to arrest, including: *State v. Adams*, 221 Wis. 2d 1, 584 N.W.2d 695, 699 (Wisc. Ct. App. 1998); *Key-El v. State*, 349 Md. 811, 709 A.2d 1305, 1310-11 (Md.), *cert. denied*, 525 U.S. 917 (1998); *State v. Dreher*, 302 N.J. Super. 408, 695 A.2d 672, 704-06 (N.J. Super. Ct. App. Div.), *certification denied*, 152 N.J. 10, 702 A.2d 349 (1997), *cert. denied*, 524 U.S. 943 (1998); *State v. Kiser*, 43 Conn.

(continued...)

Still other circuits permit the prosecution to "fairly comment" on a defendant's silence. *See United States v. McNatt*, 931 F.2d 251 (4th Cir. 1991), *cert. denied, McNatt v. United States*, 502 U.S. 1035 (1992) (relying upon the reasoning of *United States v. Robinson*, 485 U.S. 25 (1988) (where prosecutor sought permission to comment upon the defendant's failure to testify not on his own initiative, nor to treat silence as substantive evidence of guilt, but simply in fair response to a claim made by defendant or his counsel); *see also United States v. Isaac*, 134 F.3d 199, 206-07 (3d Cir. 1998) (prosecutor's rebuttal "was a fair response to defense counsel's closing argument"). Consistent with the reasoning employed in *Jenkins*, these circuits reason that, on balance, such silence is not violative of the Fifth Amendment.

The *Jenkins* majority based its holding on the finding that "[i]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial." *Jenkins*, 447 U.S. at 238. While this rationale was implicated in *Jenkins* because the defendant there took the stand, arguably, it should apply with equal force to a situation, like that at issue in the instant case, where the State is merely rebutting an argument advanced by the defendant.

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[6] (...continued)
App. 339, 683 A.2d 1021, 1029 (Conn. App. Ct.), *appeal denied*, 239 Conn. 945, 686 A.2d 122 (1996), *cert. denied* 520 U.S. 1190 (1997); *State v. Houle*, 162 Vt. 41, 642 A.2d 1178, 1181 (Vt. 1994); *State v. Masslon*, 746 S.W.2d 618, 626 (Mo. Ct. App. 1988); *State v. Hegelson*, 303 N.W.2d 342, 348-49 (N.D. 1981); *see also State v. Lee*, 15 S.W.3d 921, 925-926, n. 7, 2000 Tex. Crim. App. LEXIS 44 (Tex. Crim App. 2000) (implying that prearrest silence is a constitutionally permissible area of inquiry).

B. Significant Governmental Interest

The prosecution has a significant interest in presenting relevant evidence of a defendant's guilt at trial. *See Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (stating that prosecution has interest in presenting all relevant evidence to rebut defendant's exculpatory story); *see also United States v. Maggitt*, 784 F.2d 590, 596-98 (5th Cir. 1986) (discussing prosecution's "probative" interest in presenting evidence of defendant's prior criminal convictions); *United States v. Leichtman*, 742 F.2d 598, 603-05 (11th Cir. 1984) (discussing prosecutor's "probative" interest in introducing evidence to establish motive in kidnapping case). The prosecution's purpose is to convict guilty parties. In *Jenkins*, one of the government's concerns was advancing the truthfinding function of the jury. *Jenkins*, 447 U.S. at 238 (*quoting Brown v. United States*, 356 U.S. 148, 156 (1958) (stating that once defendant decides to testify, truth prevails in balance against self-incrimination)). Similarly, in cases involving prosecutorial use of prearrest silence, where the relevant evidence is presented to rebut a defendant's affirmative defense at trial, the government has a significant interest in providing the jury with all available evidence to assist with its deliberation.

Prosecutorial use of such prearrest silence will provide additional relevant evidence to the jury, thus assisting the jury in its search for the truth. *See United States v. Rincon*, 28 F.3d 921, 923-25 (9th Cir.), *cert. denied, Rincon v. United States*, 513 U.S. 1029 (1994) (discussing importance of providing the jury with all evidence admissible under Federal Rules of Evidence and relevant to the case) (*citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). As the *Jenkins* Court explained, it is legitimate for the state to impeach a defendant with his prearrest silence because such impeachment "may enhance the reliability of the criminal process." *Jenkins*, 447 U.S. at 238. Moreover, the Federal Rules of Evidence permit admission in a criminal trial

of all relevant evidence, so long as its probative value exceeds its prejudicial effect. *See* Federal Rules of Evidence 401, 403. A defendant's prearrest silence may have probative value if the silence is inconsistent with the position the defendant assumes at trial.

In determining whether the prearrest silence is inconsistent, some courts ask whether it would have been "natural" for the defendant to speak up under the circumstances. *See United States v. Hale*, 422 U.S. 171, 176-80 (1975) (*citing* John Henry Wigmore, 3A *Evidence in Trials at Common Law* § 1042 (Chadbourn rev ed 1970) (prohibiting impeachment use of defendant's pretrial silence on evidentiary grounds). For example, if a defendant who has remained silent prior to arrest takes the stand and testifies that he acted in self-defense, the prearrest silence suggests that the defendant is lying if it would have been natural for the defendant to come forward with his defense earlier. Likewise, if a defendant refuses to speak with the police during his prearrest investigation and then pleads not guilty at trial, the prearrest silence suggests that the defendant may, in fact, be guilty if it would have been natural for the defendant to have spoken up and proclaimed his innocence early on. If the prearrest silence does have probative value, and if the probative value exceeds the potential prejudicial effect, admitting the prearrest silence can help the fact finder discover the truth.

Furthermore, evidence of prearrest silence may be likened to circumstantial evidence which may be used at trial. For example, in its case-in-chief, the prosecution may introduce evidence that the defendant fled from the police. *See United States v. Ballard*, 423 F.2d 127, 133 (5th Cir. 1970) (asserting that law is well settled that evidence of defendant's flight is admissible evidence against him). The type of prearrest silence at issue here and flight are similar because they both involve an affirmative act on the part of a defendant which demonstrates an unwillingness to cooperate

with law enforcement. *See Rivera*, 944 F.2d at 1567-68 (stating that defendant's prearrest silence is admissible and likening it to prearrest demeanor evidence). Therefore, because courts accept that evidence of flight is admissible in the State's case-in-chief, evidence of a defendant's prearrest silence similarly should be found admissible.

Moreover, courts generally allow the prosecution to question witnesses concerning a defendant's demeanor. *See Pennsylvania v. Muniz*, 496 U.S. 582, 585-87 (1990) (providing example of prosecutor asking demeanor questions in drunk-driving context); *see also United States v. Shaw*, 701 F.2d 367, 384-85 (5th Cir. 1983), *reh'g denied*, 714 F.2d 544 (1983), *cert. denied, Shaw v. United States*, 465 U.S. 1067 (1984) (asserting that prosecution can comment on defendant's demeanor after defendant waives *Miranda* rights). Prosecution witnesses can testify to a defendant's unusual behavior. *See Muniz*, 496 U.S. at 590-92. This does not differ significantly from an officer testifying to a defendant's silence during prearrest investigatory questioning. *See Rivera*, 944 F.2d at 1567-68 (comparing evidence of defendant's prearrest silence to evidence of defendant's prearrest demeanor). Officers' testimony concerning prearrest silence and prearrest demeanor both reference a defendant's unspoken actions. Therefore, because no significant difference exists between demeanor and prearrest silence evidence, a court should allow evidence of a defendant's prearrest silence in the prosecution's case-in-chief. *See Rivera*, 944 F.2d at 1568-69.

Since the use of the defendant's pre-*Miranda* "talk to my lawyer" statement to rebut his claim of mental incapacity is consistent with this Court's precedent allowing for the impeachment use of similar statements, will advance the truthfinding function of criminal trials, is analogous to the permissible use of circumstantial and demeanor evidence, and because both the federal circuit courts of appeal and the state appellate courts are split on whether the prosecu-

tion may use evidence of a defendant's noncompelled pre-arrest silence in its case-in-chief, this Court should grant *certiorari* and resolve the confusion. This issue demands uniform treatment among all federal and state courts.

II. This Court should address whether the concept of "prejudice" embodied in *Strickland* may be established by testimony from a defense witness on cross-examination which merely confirms the defendant's guilt.

A. "Fair trial" understanding of Strickland

In *Strickland v. Washington*, 466 U.S. 666 (1984), the Court began its analysis by recognizing a long line of cases establishing that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Id.* at 684-85 (*citing Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963)); *see also Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (reemphasizing same). In giving meaning to the right to counsel, the Court remained guided by this "purpose—to ensure a fair trial." *Strickland*, 466 U.S. at 686. The two-pronged test articulated by the Court reflects this concern, requiring that defendant demonstrate (1) deficient performance and (2) prejudice.[7] In order to demonstrate the requisite prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court further defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* In applying this standard, the Court was mindful of the importance of practical considerations and warned against the

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[7] Petitioner concedes that counsel's performance was deficient. She focuses her argument exclusively on the prejudice prong.

mechanistic application of its rule. *Id.* at 696. The ultimate focus, it instructed, must be on the fundamental fairness of the proceeding in question. *Id.*

Keeping in mind the Court's focus and its admonition against mechanical application, the lower court's contrary finding of prejudice justifies the grant of *certiorari* here. Straightforward application of the principles underlying the rule announced in *Strickland* here should have resulted in a finding of no prejudice on the ineffective assistance claim regarding the testimony of Dr. Fisher on cross-examination. *See Fretwell*, 506 U.S. at 370 n. 3. This case presents a situation "in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *See Williams v. Taylor*, 529 U.S. 362, 417 (2000). While no one decision of the Court appears to have squarely addressed this issue, the reasoning employed in several of its opinions suggests that such evidence leads to neither an unjust nor unfair verdict.

For example, although the instant case is factually distinct from the situation presented in *Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986), the precedential value of that case for this one is clear. In *Nix*, the Court held that even if a defendant's false testimony might have persuaded the jury to acquit him, it was not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *See also id.* at 186-87 (Blackmun, J., concurring) ("To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize . . . . Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice"). As a matter of law, the Court held that *Strickland* prejudice could not be established based upon whether the jury would have been swayed by the perjured testimony. *See Nix*, 475 U.S. at 175. Instead, the

Nix Court identified the "benchmark" of an ineffective assistance claim as the fairness of the proceeding. *Id.* Consequently, the Court's decision turned on whether the jury's verdict was rendered unreliable because they did not get to hear the perjury. *Id.*

Similarly, in *Lockhart v. Fretwell*, 506 U.S. 364, 369-72 (1993), the Court concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by the Court's opinion in *Strickland*. The death sentence imposed by the state of Arkansas on Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). However, before trial, the United States Court of Appeals for the Eighth Circuit held that such "double counting" was impermissible. *See Collins v. Lockhart*, 754 F.2d 258, 265 (8th Cir. 1985), *cert. denied, Lockhart v. Collins*, 474 U.S. 1013 (1985). Fretwell's counsel (who, undoubtedly was unaware of *Collins*), failed to object to the double counting. Then, before Fretwell's claim for federal *habeas corpus* relief reached this Court, *Collins* was overruled.[8] Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the State had a right to rely on the

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[8] *See Lowenfield v. Phelps*, 484 U.S. 231 (1988), *reh'g denied*, 485 U.S. 944 (1988) (holding that an aggravating circumstance may duplicate an element of the capital offense if the class of death-eligible defendants is sufficiently narrowed by the definition of the offense itself); *see also Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *reh'g en banc denied*, 1989 U.S. App. LEXIS 11036 (1989), *and cert. denied*, 493 U.S. 959 (1989) (holding that *Lowenfield* required court to overrule *Collins*).

disputed aggravating circumstance. *See Williams*, 529 U.S. at 417.

The reasoning employed in both *Nix* and *Fretwell* applies with equal force to the instant case. Here, as in those cases, the result of the proceeding was rendered neither unreliable nor fundamentally unfair as a result of the prosecution's cross-examination of defense witness, Dr. Fisher. Moreover, the Sixth Circuit's contrary finding is akin to the granting of a "windfall" which the Court's decisions have disdained. *See Fretwell*, 506 U.S. at 369-70 (*citing Nix*, 475 U.S. at 175).

Like the aforementioned cases, the instant case illustrates another factor that ought not to inform the prejudice inquiry. In this sense, it is analogous to a point addressed by Justice Powell in his concurrence in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Justice Powell observed that "the exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just, because it 'deflects the truthfinding process and often frees the guilty.'" *Id.* at 396 (Powell, J., concurring) (*quoting Stone v. Powell*, 428 U.S. 465, 490 (1976)); *see also Holman v. Page*, 95 F.3d 481, 492 (7th Cir.), *reh'g en banc denied*, 102 F.3d 872 (1996), *cert. denied*, 520 U.S. 1254 (1997) (citing Justice Powell's concurrence in *Morrison* with approval and holding that under *Strickland* no prejudice exists when evidence gathered in violation of the Fourth Amendment is erroneously admitted at trial).

B. The chilling effect of the Sixth Circuit's concept of *Strickland* prejudice

Viewed as a whole, the Court's decisions illustrate that "the touchstone of an ineffectiveness claim is the fairness of the adversary proceeding," *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993), whose "'premise . . . is that partisan ad-

vocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (*quoting Herring v. New York*, 422 U.S. 853, 862 (1975)).

However, if allowed to stand as correct, the Sixth Circuit's view of *Strickland* prejudice will undermine the advocacy of state prosecutors and frustrate the ultimate truth seeking function of a trial. *See Nix*, 475 U.S. at 174 ("lawyer is an officer of the court and a key component of a system of justice, dedicated to a search for truth."). Simply stated, the lower court's decision chills effective cross-examination by prosecutors. While the Court has held that *Strickland*'s prejudice prong does not implicate the same concerns as the performance prong, such as dampening the ardor or impairing the independence of defense counsel (*Fretwell*, 506 U.S. at 372), these concerns do implicate *Strickland*'s prejudice prong with regard to the prosecuting attorneys' conduct in situations like that presented here.

The Sixth Circuit's view of prejudice discourages vigorous cross-examination. In instances where defense counsel would merely be deficient under *Strickland*'s first prong (*e.g.* for failing to prepare his witness), a vigorous cross-examination could potentially result in additional incriminating evidence which, while furthering the truthfinding function of the trial, could potentially result in sufficient prejudice under *Strickland*'s second prong. In this way, vigorous advocacy would result in elevating what would ordinarily be a mere deficiency on defense counsel's part to constitutionally ineffective assistance of counsel. Thus, if the Sixth Circuit's analysis is taken to its logical conclusion, prosecutors will lack reasonable power, or desire, to test the truth of a defense or to effectuate the truthfinding function of a trial. *See Nix*, 475 U.S. at 185 (Blackmun, J., concurring) (suggesting that the sole ultimate objective of a trial is a judgment resting on truth).

C. No reasonable probability of acquittal on these facts

The lack of merit of Combs' prejudice claim should have been apparent to the Sixth Circuit. Given the overwhelming evidence of intent and premeditation presented by the prosecution in this case, it is not "reasonably probable" that the evidence that Combs suggests should not have been presented would have resulted in his acquittal. *See* Pet. at 2-3 (for a detailed description of the evidence of intent and premeditation). Combs has no valid claim that confidence in his trial was diminished by Dr. Fisher's testimony on cross-examination which further served to establish his guilt. *See Nix v. Whiteside*, 475 U.S. 157, 175 (1986). The Sixth Circuit's holding simply fails to account for the fact that no showing was made here that the justice of Combs' sentence was rendered unreliable by a breakdown in the adversarial process. *Strickland*, 466 U.S. at 700.

CONCLUSION

For the aforementioned reasons, the *amici* States respectfully urge this Court to grant Warden Margaret A. Bagley's Petition for Writ of *Certiorari*.

Respectfully submitted,

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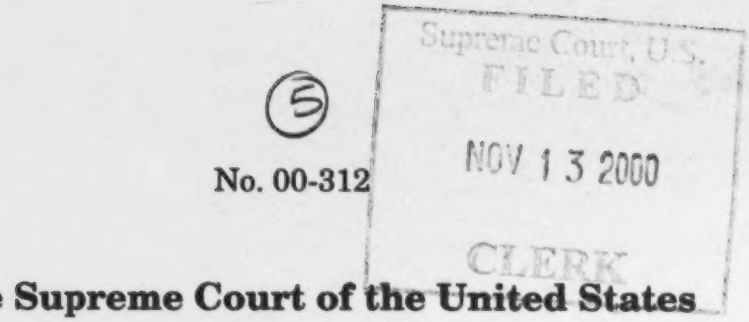

No. 00-312

In the Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN, Petitioner,

v.

RONALD DEAN COMBS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The petition establishes the compelling basis for a writ of certiorari in this case: deep disagreement among the courts of appeals on an important and unresolved question of Fifth Amendment law, coupled with an equally important and unresolved question concerning Sixth Amendment claims of ineffective assistance of counsel. Nothing in Combs' opposition to the petition undermines this compelling basis for certiorari.

I. The circuit conflict on the Fifth Amendment issue is genuine and widespread.

As the Sixth Circuit discussed (App. 22a-24a), there is deep division among the courts of appeals on the question whether prosecutorial reliance on pre-*Miranda* silence violates the Fifth Amendment. Despite respondent's suggestion (Opp. 24-25), this conflict is not diminished by the fact that this question arises in different factual contexts.

As the petition observes (at 12-13), this Fifth Amendment issue can arise in situations of pure silence or, instead, where a defendant uttered words invoking his right to remain silent. It also can arise with respect to silence that occurs either before a defendant is taken into custody or after a defendant is in custody but before *Miranda* warnings. And it can arise in situations where the prosecution uses the pre-*Miranda* silence as affirmative evidence of a guilty conscience or, instead, to rebut a claim presented by the defense. These various permutations have exacerbated confusion among the courts of appeal, thus increasing the need for the Court to provide guidance on this Fifth Amendment issue.[1]

A. As a result of the deep confusion among the lower courts on this issue, we can discern at least five

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[1] The *amicus* brief of Illinois *et al.* (at 5 n.2, 9-10 n.6) notes that state courts also are sharply divided on this Fifth Amendment question.

distinct (and inconsistent) rules of Fifth Amendment law currently being applied to these pre-*Miranda* cases.

First, there is the categorical rule that prosecutorial reliance on silence that occurs before *Miranda* warnings does not violate the Fifth Amendment. *See United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991).[2] *See also United States v. Williams*, 405 F.2d 14, 16 (4th Cir. 1968) (Fifth Amendment does not bar use in case-in-chief of defendant's pre-*Miranda* silence in response to preliminary investigative question by police, at scene of the crime); *United States v. Rederth*, 872 F.2d 255, 257-58 (8th Cir. 1989) (no violation for government's case-in-chief to include evidence of defendant's silence prior to *Miranda* warnings because the defendant received no "implicit affirmative assurance that a suspect's silence will not be used against him").

Second, there is the equally categorical but opposite rule, adopted by the Sixth Circuit here (App. 24a, 30a), that prosecutorial reliance on pre-*Miranda* silence in its case-in-chief always violates the Fifth Amendment.

Third, there is the rule that reliance on pre-*Miranda* silence is permissible only if it occurred before arrest. *See United States v. Velarde-Gomez*, 224 F.3d 1062, 1069-70, *modified on other grounds*, 2000 WL 1514639 (9th Cir. Oct. 13, 2000); *see also United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) ("custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*").

Fourth, there is the rule that reliance on silence is permissible only if it is a "fair response" to what the

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[2] Combs attempts to distinguish *Rivera* as concerning only due process, and not the Fifth Amendment, but *United States v. Simon*, 964 F.2d 1082, 1086 n.* (11th Cir. 1992), expressly refutes this point. *See id.* (citing *Rivera* to reject "fifth amendment" claim and confirming categorical rule that "[s]ilence is admissible in the absence of *Miranda* warnings"). *Accord United States v. Campbell*, 223 F.3d 1286, 1290 (11th Cir. 2000).

defendant asserts at trial. *See United States v. Isaac*, 134 F.3d 199, 206 (3d Cir. 1998).[3]

Fifth, there is the rule that limits permissible rebuttal to cases in which the defendant has affirmatively uttered words invoking the right to remain silent. *See Thomas v. Indiana*, 910 F.2d 1413, 1416 (7th Cir. 1990).[4]

This cacophony among the circuits had not yet developed twenty years ago, when this Court noted that the issue remained unresolved. *See Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980). Now, however, there is a pressing need for the Court to address this ever-increasing disarray.

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[3] In an effort to distinguish *Isaac*, Combs says that he never attempted to use "his silence as a sword" (Opp. at 25), but that is precisely what he did. As explained in the petition (at 13), Combs put his cognitive capacity at issue at the outset of his trial, and he did so knowing that at the time of the shootings he had uttered words inconsistent with his assertion of mental incapacity. This effort to argue mental incapacity free from the burden of inconsistent evidence is an attempt to use a purported Fifth Amendment right "as a sword, rather than a shield." *Isaac*, 134 F.3d at 206.

[4] Combs cites *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1992), as repudiating *Thomas*, but it does not. First of all, there is no mention of *Thomas* in *Hernandez*. Second, *Hernandez* did not involve a situation, like *Thomas*, in which a defendant uttered words asking for a lawyer but then at trial claimed he was mentally incompetent when he uttered these words. *See Thomas*, 910 F.2d at 1414. Instead, *Hernandez* was a case of pure silence before warnings. *See Hernandez*, 948 F.2d at 322. And *Hernandez* did not involve the rebuttal use of silence in response to a claim made by the defendant at trial, but rather an unprovoked attempt by the prosecution to suggest that the defendant's silence at the time of arrest was probative of defendant's guilt. *Id.* at 323-24. Thus, *Hernandez* cannot be read as negating the proposition affirmed in *Thomas* that prosecutors may rely upon a defendant's express request for counsel, as long as it occurred before *Miranda* warnings, to rebut a defense of mental incapacity.

B. Combs contends (Opp. 21) that the Fifth Amendment question presented is not properly before the Court because the proceedings below did not specifically address the "public safety" exception to the *Miranda* warnings requirement. *See New York v. Quarles*, 467 U.S. 649 (1984) (exigencies at crime scene justify initial questioning without *Miranda* warnings). But that contention misses the key point for purposes of this Court's review on certiorari. The question presented concerns, not the scope of the "public safety" exception, but rather whether the Fifth Amendment bars evidence of pre-*Miranda* silence.

In addressing the question presented, this Court need not consider the scope of the "public safety" exception if the Court adopts the categorical rule that the Fifth Amendment simply does not apply to pre-*Miranda* silence. Rather, the "pubic safety" exception becomes relevant only if the Court were to adopt an intermediate rule that reliance on pre-*Miranda*-yet-post-custody silence is impermissible unless warnings were not required at the time. Only then would it become necessary to address whether *Miranda* warnings were required before Officer Ventre, upon discovering the live ammunition taped to Combs' torso and still not knowing the identity or whereabouts of who shot Combs, asked him what had happened.

Moreover, if the Court were to adopt this intermediate rule, the Court could remand to the court of appeals the subsidiary question concerning the scope of the "public safety" question. Alternatively, the Court could choose to address the subsidiary question as fairly subsumed within the question presented.[5] Either way, there is no doubt that the question presented itself is

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[5] *See* R. Stern *et al.*, Supreme Court Practice 338-39 (7th ed. 1993) (predicate issues may be regarded as fairly subsumed) (collecting cases). More recent cases are in accord. *See, e.g. Missouri v. Jenkins*, 515 U.S. 70, 84 (1995).

properly before the Court, as both parties argued it below and the court of appeals decided it in Combs' favor.[6]

C. Furthermore, there is a circuit conflict even if the Fifth Amendment issue is considered most narrowly, focusing on the particular facts of this case. The Sixth Circuit's decision here is irreconcilable with the Seventh Circuit's decision in *Thomas (see, supra,* at 3) on the precise circumstance in which a pre-*Miranda* invocation of the right to remain silent is used to rebut a defense of mental incapacity. Although *Thomas* largely concerned an issue of post-*Miranda* silence, this fact does not undermine the key point that *Thomas* also specifically pronounced that the rule of *Wainwright v. Greenfield*, 474 U.S. 284 (1986), does not apply to a pre-*Miranda* situation.

The Seventh Circuit's opinion in *Thomas* is clear in this regard. When first noting that Thomas "asked for a lawyer . . . before he was given his *Miranda* warnings," the court stated that the prosecution's reliance on this request to rebut the defense of insanity "raises no problems." *Thomas*, 910 F.2d at 1414. Then, to confirm the constitutionally dispositive distinction between pre- and post-*Miranda* requests for counsel, the court repeated that "since the request was made before he was given his *Miranda* warnings this testimony did not violate *Greenfield*." *Id.* at 1416. This pronouncement, which remains good law in the Seventh Circuit (*see*, *supra*, n.4), is directly contrary to the Sixth Circuit's grant of habeas

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[6] As explained in the petition (at 19 n.23), this properly presented question is unaffected by the applicability of Ohio rules of evidence to the "Talk to my lawyer" statement. Although Combs attempts to raise this state-law issue as an obstacle to the question presented (Opp. 22), the dispositive point is that the Ohio Supreme Court held that counsel's failure to raise this state-law issue was harmless error (App. 278a) and, therefore, that failure cannot serve as *Strickland* prejudice (since no relief would have been available).

relief in this case, which involves facts indistinguishable from those in *Thomas*.

Thus, whether to address the confusion among the circuits on the issue of pre-*Miranda* silence generally or, alternatively, to resolve the specific split between the Sixth and Seventh Circuits on rebutting a defense of mental incapacity with the defendant's own pre-*Miranda* requests, this Court should grant certiorari in this case.[7]

II. The *Strickland* "prejudice" issue also deserves review.

Combs argues that *Williams v. Taylor*, 120 S.Ct. 1495 (2000), forecloses the petition's second question, which concerns the correct understanding of "prejudice" for purposes of ineffective-assistance-of-counsel claims. That argument, however, is incorrect. As explained in the petition (at 24), there is a significant difference between *Williams* and this case.

Williams involved counsel's failure to discover evidence *favorable to the defendant* that might well have caused the jury to vote against the death penalty. 120 S.Ct. at 1515-16. This case, by contrast, involves counsel's failure to anticipate the vulnerability of a defense witness to cross-examination that may elicit testimony *favorable to the prosecution* by corroborating the prosecution's own evidence of the defendant's guilt. While the death sentence in *Williams* was unreliable as a

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[7] Combs claims that "[t]here is no authority for the proposition that the mere assertion of a defense is sufficient to open the door for the admission of otherwise inadmissible evidence of silence." Opp. at 25 n.7. As the petition notes (at 14), however, in *United States v. Robinson*, 485 U.S. 25, 32 (1988), this Court explicitly stated that when "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege." The evident tension between *Robinson* and the decision below is an additional reason to grant certiorari.

result of counsel's failure, there is nothing unreliable about Combs' conviction as a result of counsel's failure to anticipate the prosecution's effective cross-examination. This night-and-day difference in the reliability of the jury verdicts goes to the heart of what *Strickland* "prejudice" is all about. *See Strickland v. Washington*, 466 U.S. 668, 691-92 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."). For this reason, the question whether a prosecution's effective cross-examination counts as "prejudicial" within the meaning of *Strickland* is very much an open issue after *Williams*.

An example illustrates the point. Suppose a defense counsel puts a witness on the stand failing to realize that the witness knows where the defendant hid the murder weapon. When this evidence comes out on cross-examination, it clinches the prosecution's case. Even so, the defendant did not suffer "prejudice" in the relevant sense, since the cross-examination confirmed the defendant's guilt, and thus the conviction should not be overturned as unreliable.

In this case, Dr. Fisher's testimony on cross-examination is equivalent to the unexpected revelation of the murder weapon's location. As Combs himself acknowledges, it confirmed that he is guilty of the crime charged: "Dr. Fisher's testimony, as well as the 'talk to my lawyer' statement, completely undermined Mr. Combs' ability to establish the absence of intent and purpose." Opp. 29. In other words, this evidence thoroughly refuted Combs' claim that he was innocent.[8]

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[8] Combs cites *State v. Slagle*, 65 Ohio St.3d 597, 605 N.E.2d 916 (Ohio 1992), for the proposition that the cross-examination of Dr. Fisher was improper under Ohio law. In fact, *Slagle* establishes the opposite. When an expert witness for the defense testifies that the defendant's judgment was impaired by alcoholism, the prosecution is entitled on cross-examination to "ask questions designed to elicit the [expert's] opinion" that the

The Sixth Amendment does not require a new trial when attorney error causes the jury to hear additional testimony that corroborates the prosecution's evidence of the defendant's guilt. This Court, moreover, should not leave unreviewed the Sixth Circuit's contrary decision. As the *amicus* brief of Illinois *et al.* emphasizes (at 18), the practical consequences of that decision will be to dampen a prosecutor's ardor for cross-examination and to make convictions vulnerable when prosecutors are effective in undermining claims of innocence.[9]

III. The remaining issues in the opposition were not grounds for the Sixth Circuit's judgment.

The Sixth Circuit rested its judgment solely on counsel's performance regarding two pieces of evidence: Dr. Fisher's testimony on cross-examination and the "Talk to my lawyer" statement. This is clear from the court's discussion of *Strickland* "prejudice," where it concludes that "defense counsel made two crucial errors" that qualify for habeas relief. App. 40a. Although the court elsewhere in its opinion criticized the performance of trial counsel in other respects, it pointedly limited its

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defendant's mental competency was not "affected by his alcoholism." *Id.* at 608. In expressly rejecting a claim that such cross-examination is improper, the Ohio Supreme Court asserted: "Cross-examination is 'permitted on all relevant matters and matters affecting credibility.'" *Id.* (quoting state rule of evidence).

[9] Contrary to Combs' assertion (Opp. 29), the prosecution had ample additional evidence of Combs' intent to murder Joan and Peggy Schoonover: he hunted them down, smashed in their car window, and paused before putting the gun to each of their heads. As the petition explains (at 25-26), this evidence makes the Sixth Circuit's "reasonable probability" determination plainly erroneous, and we ask the Court to reverse on this alternative ground if the Court does not adopt our understanding of *Strickland* prejudice.

finding of *Strickland* prejudice to these "two critical errors by defense counsel." App. 42a. As finding prejudice is essential to granting habeas relief, it necessarily follows that the court's judgment is confined to these two grounds. Thus, Combs is inaccurate in describing the Sixth Circuit's decision as resting on a "totality of constitutional deprivations" analysis. Opp. 16.

Perhaps because of this inaccuracy, Combs devotes much of his opposition to addressing issues that were not the basis of the Sixth Circuit's judgment and thus are not germane to the petition.[10] The two questions presented in the petition are properly focused on the two grounds upon which the Sixth Circuit rested its judgment. Because both questions are important and unsettled issues of federal constitutional law, and because the circuit conflict on the Fifth Amendment question is especially in need of resolution, this Court should grant the petition.

CONCLUSION

For these reasons, and those in the petition itself, the petition should be granted.

Respectfully submitted,

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[10] Each of these arguments, moreover, was rejected by the district court.